



*The*  
**JERE BEASLEY REPORT**

*February 2018*

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# I. CAPITOL OBSERVATIONS

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## ALABAMA LANDMARKS NOW PART OF CIVIL RIGHTS TRAIL

Dr. Martin Luther King Jr. Day may be over, but Alabama's place in the new U.S. Civil Rights Trail is here to stay. The trail links "almost 130 museums, churches, courthouses and other landmarks that were essential to the advancement of social equality during the volatile 1950s and 1960s." Alabama's share includes 10 sites in Montgomery, seven in Selma, four in Birmingham and four in Tuskegee.

The creation of the trail is the first time tourism departments from multiple Southern states have worked together to jointly promote civil rights sites. My friend Lee Sentell, Director of the Alabama Department of Tourism, stated:

*The subject of human rights has never been more relevant. The landmarks in Birmingham, Selma and Montgomery already attract visitors from Britain, Europe and Australia as well as from the U.S. Now that the South has a website that raises the visibility of minor sites, we can expect more tourists in Monroeville, Tuskegee and Scottsboro.*

The two-year effort to create the trail began when National Park Service Director Jonathon Jarvis called for an inventory of surviving civil rights landmarks. Georgia State University found 60 sites, and Lee Sentell "helped spearhead an effort by TravelSouth USA to have the 12 Southern states in represents supplement the list with other worthy sites. The Alabama trail sites are:

- Anniston: Freedom Riders National Monument
- Birmingham: 16<sup>th</sup> Street Baptist Church, Bethel Baptist Church, Birmingham Civil Rights Institute, Kelly Ingram Park
- Monroeville: Old Courthouse Museum
- Montgomery: Alabama State Capitol, City of St. Jude, Civil Rights Memorial Center, Dexter Avenue King Memorial Baptist Church Dexter Parsonage Museum, First Baptist Church on Riley

Street, Frank M. Johnson Jr. Federal Building and United States Courthouse, Freedom Rides Museum, Holt Street Baptist Church, Rosa Parks Museum

- Scottsboro: The Scottsboro Boys Museum and Cultural Center
- Selma: Brown Chapel AME Church, Edmund Pettus Bridge, Lowndes Interpretive Center, National Voting Rights Museum and Institute, Selma Interpretive Center, Selma to Montgomery National Historic Trail, The Sullivan and Richie Jean Sherrod Jackson Foundation and Museum
- Tuscaloosa: Foster Auditorium at the University of Alabama
- Tuskegee: Butler Chapel AME Zion Church, Tuskegee Airmen National Historic Site, Tuskegee History Center, Tuskegee University

Gov. Kay Ivey made Alabama's trail announcement on Jan. 15 at Dexter Avenue King Memorial Baptist Church. Other speakers at the church included Montgomery Mayor Todd Strange, Montgomery County Commission Chairman Elton Dean and Joseph Carver, the vice president of the Montgomery Improvement Association. You can go to [www.civilrightstrail.com](http://www.civilrightstrail.com) to obtain information about the trail.

Source: *Montgomery Advertiser*

## II. AUTOMOBILE NEWS OF NOTE

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### UNDERRIDE GUARD LEGISLATION FOR LARGE TRUCKS WOULD SAVE LIVES

On Thanksgiving Day of 2004, Lois Durso got the call no mother ever wants to receive. A slippery road caused the car her daughter's fiancé was driving to slide under the side of a large truck traveling next to them, dragging their car down the road in its rear wheels, crushing 26-year-old Roya Sadigh to death.

A new bill intended to reduce the number of accidents like the one that took Roya's life was introduced by U.S. Senators Kirsten Gillibrand (D-NY) and Marco Rubio (R-FL) on Dec. 12. The Stop Underrides Act was introduced in Roya's memory along with the many others—an

estimated 300 people per year—who died in an underride crash.

In this type of crash, a car slides under the body of a large truck, rendering the car's safety features mostly useless. Often, these accidents are fatal even at low speeds and include injuries like decapitation. But a way to minimize the extent of these tragic injuries is within reach. As Ms. Durso says on her website Stop Underrides:

*The technology is available to equip every truck in this country with underride protection. It's not the crash that kills—it's the underride. Without underride protection on trucks, every passenger vehicle is*

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*vulnerable to underride crashes. There is a solution that will save countless lives.*

In fact, rear underride guards have been mandated on large trucks since 1996, but despite a 2014 recommendation from the National Transportation Safety Board (NTSB) suggesting front and side underride guards would save lives, they still have not been mandated. To demonstrate the value of underride guards, the Insurance Institute for Highway Safety (IIHS) demonstrated the difference between a guard and a skirt intended for aerodynamics. The first resulted in an airbag deployment as in any front-end collision, and the second resulted in a truck trailer resting on top of the front passenger seats. The proposed bill would improve the guidelines for preexisting rear underride guards and introduce requirements for side and front underride guards.

According to the bill, one year after the date of its enactment, a final rule requiring new trucks to be equipped with side underride guards must be issued, and within two years after its passage, a final rule requiring all existing trucks to be retrofitted must be issued. For front underride guards, the bill outlines a two-year timetable for a final rule for new trucks and a three-year timetable for a final rule to require retrofitting older models.

Data on victims of underride crashes also would be required to be displayed on a public website. Placing public safety over profit margin should not have to be something an industry is forced to do, but sadly, that appears to be the case. A guard could have easily saved Roya Sadigh's life and countless others. Those in positions of authority must recognize the risk of underride crashes and eliminate this major safety hazard.

Chris Glover is a lawyer in our Atlanta office who handles cases involving truck accidents. For more information about truck underride regulations and accidents, contact him at 800-898-2034 or email [Chris.Glover@beasleyallen.com](mailto:Chris.Glover@beasleyallen.com).

Sources: Stop Underrides, Marco Rubio, U.S. Senator, Kristen Gillibrand, U.S. Senator, Insurance Institute for Highway Safety Data, Federal Register and National Transportation Safety Board

#### **FIAT CHRYSLER FACES CLASS ACTION OVER ALLEGED ENGINE DEFECT**

A putative class action has been filed against Fiat Chrysler Automobiles (FCA)

in a California federal court. It's alleged that the automaker's 2017 and 2018 Chrysler Pacifica vehicles equipped with a 3.6-liter V6 engine contain a design defect that causes the vehicles to stall at high speeds without warning.

The complaint filed on Dec. 30 by lead Plaintiffs Ryan and Sarah Wildin alleges they would not have purchased their new 2017 Chrysler Pacifica, or they would have paid less for it, had they known about the defect. Allegedly the defect causes moving vehicles to shut down at speeds as fast as 70 mph on the highway. The suit says:

*The stalling defect prevents the driver from operating the vehicle as intended, which results in a range of unsafe conditions, including the inability to change speed or steer, often while in traffic and at high rates of speed.*

The putative class action comes after the National Highway Traffic Safety Administration (NHTSA) announced in December it would follow up on a non-profit's petition requesting that the agency look into 57 customer complaints claiming their 2017 Chrysler Pacificas lost engine power without warning at various speeds. One driver claimed the vehicle lost power while traveling at 40 mph on local roads, and another said the car stalled at 60 mph while driving in a tunnel.

NHTSA has not yet made a determination on whether there is a defect. In their suit, the Wildins allege that since they purchased their Chrysler Pacifica in September 2016, they have experienced symptoms of the alleged defect multiple times and once while driving on the highway. As a result, they claim they've returned their vehicle for repairs twice, but the alleged defect still is not fixed, the suit says. The complaint alleges Fiat Chrysler knew of the vehicles' problems from customer complaints posted online in March 2016.

The Wildins claim the automaker should have known about the defect through its pre-market testing, through complaints made to the NHTSA, and through other sources, and Fiat Chrysler should have warned drivers.

This is not the first problem with the 9-speed automatic transmission at issue in this case. It has been "plagued" by consumer complaints since it was first introduced in the 2014 Jeep Cherokee and 2015 Chrysler 200. FCA has also released multiple service bulletins about the com-

puter software that controls the 9-speed transmission. In addition, FCA executives have confirmed that the company has been working to refine the transmission, according to the complaint.

Claims are made in the suit under California's Consumers Legal Remedies Act and its Unfair Competition Law. The complaint also asserts breach of implied warranty claims under the Song-Beverly Consumer Warranty Act and the Magnuson-Moss Warranty Act, as well as an unjust enrichment claim. The Wildins seek to represent a nationwide class of drivers who purchased or leased a 2017 or 2018 Chrysler Pacifica vehicle equipped with a 3.6-liter V6 engine and a 9-speed automatic transmission. They seek restitution, attorneys' fees and costs, compensatory, exemplary and statutory damages plus interest, and declaratory relief, and more.

Ryan and Sarah Wildin are represented by Jordan L. Lurie, Tarek H. Zohdy, Cody R. Padgett and Karen L. Wallace of Capstone Law APC. The case is *Wildin et al. v. FCA US LLC*, (case number 3:17-cv-02594), in the U.S. District Court for the Southern District of California.

Source: Law360.com

#### **TENNESSEE MAY BECOME INTO DUMPING GROUND FOR DANGEROUS CARS**

It's being reported that a new law in Tennessee could put countless dangerous cars on the state's roads by allowing dealers to easily sell cars that are under safety recall. Consumer advocates are alerting the media and the public to the problems. Andy Spears, who is with Tennessee Citizen Action, stated:

*It basically makes Tennessee a dumping ground for unsafe cars that will kill people. And now there's an incentive for dealers in other states to ship their dangerous cars here to our dealers, because now we have a way to get rid of those cars.*

The Motor Vehicle Recall and Disclosure Act allows used car dealers to sell vehicles under safety recall as long as the buyer signs a disclosure form. Consumer advocates like Spears argue a majority of buyers will overlook that sheet of paper, which will likely be in a group of other forms a person is asked to sign when buying a car.

Spears said the law reverses important protections for car buyers and puts every driver on the road at risk. He added:

*Previously, the Consumer Protection Act in Tennessee would've allowed you to have at least a cause of action and it would've discouraged dealers from selling the most dangerous cars. Now all they have to do is give you a form that says we know this car is unsafe, you may not be able to get it fixed, but we're going to sell it to you anyway. If you sign that, you can't hold the dealer accountable later.*

It appears the law was passed in a rather strange manner. Reportedly, during the legislative session, Senator Frank Nicely (R) amended an unrelated bill, essentially deleting the subject of the bill and replacing it with the recall law.

Spears said that individuals who typically follow automotive legislation in Tennessee had no idea such a bill was being considered. The law passed quickly and with strong support from the Automotive Association. Spears said further:

*This is the first state in the nation to pass a law this dangerous. These types of laws were denied in California, Maryland, and Virginia. So other states have seen this law but rejected it when they found out what the law does.*

Spears says the only way for Tennessee consumers to protect themselves now that the law has passed is to do their own research. Individuals should run the VIN number of any car they are looking to buy through [www.safercar.gov](http://www.safercar.gov). No person should buy a car under safety recall and neither should any dealer sell one.

#### **GM HIT WITH FIRST-KNOWN SUIT OVER SELF-DRIVING CAR CRASH**

It appears that General Motors LLC has become the first automaker to be sued over an accident involving a self-driving vehicle. The suit arises from an incident where a motorcyclist was injured when one of GM's vehicles veered into his lane and knocked him to the ground. Motorcycle driver Oscar Wilhelm Nilsson says he attempted to pass a Cruise Automation 2016 Chevrolet Bolt when the vehicle began to switch lanes. He says the car suddenly swerved back into its original

lane and hit him. His lawsuit says he has had to take disability leave from his job due to the injuries.

The accident occurred in San Francisco on Dec. 7 while the GM vehicle was in self-driving mode, according to the complaint. Nilsson said the car indicated it was merging left, so he drove straight ahead once the car had cleared lanes. It's alleged that the vehicle then swerved back into the original lane, knocking Nilsson over and causing his injuries.

Interestingly, GM reported a different version of events to California's Department of Motor Vehicles. The automaker said the car was driving in the middle of three one-way lanes when it attempted to merge into the left lane. The minivan ahead of the car slowed down, and the GM vehicle abandoned its attempt to merge, the report said. The report from GM stated:

*While the car was "re-centering" itself in the middle lane, a motorcycle that had passed between two vehicles in the center and right lanes hit the side of the car and toppled over, scuffing the side of the vehicle, the report said. The self-driving car had been keeping pace with surrounding traffic at 12 mph while the motorcycle was traveling 17 mph, the report said.*

Nilsson is represented by Trinette G. Kent and Sergei Lemberg of Lemberg Law LLC. The case is *Oscar Wilhelm Nilsson vs. General Motors LLC*, (case number 3:18-cv-00471) in the U.S. District Court for the Northern District of California.

Source: [Law360.com](http://Law360.com)

#### **TAKATA AIR BAG RECALLS NOW AT 4.4 MILLION**

American Honda Motor Co. and Toyota Motor North America Inc. are recalling an additional 1 million vehicles equipped with Takata Corp. air bags that pose an explosion risk. This comes after Takata in early January recalled another 3.3 million air bag inflators with the defect. The latest recalls of roughly 465,000 Honda and Acura and 600,000 Toyota and Lexus vehicles are part of the third phase of Takata air bag recalls announced by the National Highway Traffic Safety Administration (NHTSA). This latest recall covers frontal air bags in certain 2009, 2010 and 2013 vehicles made by Honda, Toyota, Audi, BMW, Daimler Vans, Fiat Chrysler, Ford, General Motors, Jaguar-Land Rover, Mazda, Mercedes-Benz, Mitsubishi,

Nissan, Subaru and Tesla. Automakers were to provide specific models to NHTSA.

Takata's air bags have prompted one of the largest recalls in U.S. history. There were roughly 34 million vehicles under recall as of November 2017, according to NHTSA. The recalls are being conducted in phases based on vehicles' location and age. The recent additions bring the total number of Honda and Acura automobiles under recall to almost 12 million, the company said.

As we have previously reported, the defective air bags have caused at least 11 deaths in Honda vehicles. The ammonium nitrate that inflates the bags can fire by mistake, especially in high humidity, blasting chemicals and shrapnel at passengers and drivers. Takata is facing multidistrict litigation, regulator actions, criminal investigations and a Chapter 11 bankruptcy as a result of the air bags. The company has pled guilty to wire fraud, agreed to pay \$1 billion in fines and restitution, and acknowledged that it ran a scheme to use false reports and other misrepresentations to convince automakers to buy air bag systems that contained faulty, inferior or otherwise defective inflators.

In May, Toyota, Subaru, Mazda and BMW became the first four automakers to exit the multidistrict litigation after agreeing to pay a combined \$553.6 million settlement. The auto companies have pointed to Takata's guilty plea and the settlement as a "game changer" that absolves them of most of their liability to consumers in the case. They maintained that they did not know the air bags were faulty when they installed them in vehicles.

NHTSA maintains a list of vehicles affected and guidance on steps to take if a car is affected. To find out if a vehicle is on the recall list for defective Takata air bags, visit the NHTSA website. All defective Takata air bags are under recall and will be replaced at no charge. NHTSA has an online lookup tool where drivers can enter a Vehicle Identification Number (VIN) to determine if any safety or recall issues affect their vehicle. The full list of vehicles affected by the air bag recall, broken down by manufacturer, is also available on the NHTSA website.

Sources: [Law360.com](http://Law360.com) and CNN

## **TAKATA BANKRUPTCY DISCLOSURES APPROVED AFTER NUMEROUS CHANGES**

The Chapter 11 disclosure statement for Takata, the bankrupt vehicle safety equipment maker, has now received court approval. Before making his decision, U.S. Bankruptcy Judge Brendan L. Shannon considered more than two dozen requests for modifications made by creditors, tort Plaintiffs and the federal bankruptcy watchdog. The company had filed an amended disclosure statement that included numerous additional disclosures requested by the objecting parties.

Judge Shannon, at a hearing, heard the remaining objections from the official committee of unsecured creditors, the official committee of tort claimant creditors and the U.S. trustee, among others. Various issues were presented at the hearing to the judge. The tort claimant committee's representative, James Stang of Pachulski Stang Ziehl & Jones, laid out more than 25 pages of objections to individual passages in the disclosure statement.

Judge Shannon agreed with some of the requests by the tort claimants for added disclosures, including requests for more information about nondebtor entities that will be getting third-party releases under the plan and a list of documents relating to the global transactions contemplated under the plan. The judge also said that additional disclosures would not be necessary from Takata with regard to the opt-in and opt-out provisions of the solicitation package.

It should be noted that the features would allow tort claimants to participate in a trust created under the plan that would result in their claims being satisfied from a "pot of money" contributed by the debtors and the original equipment manufacturers (OEMs) participating in the trust. The OEMs are the vehicle makers that sold cars with defective Takata airbags.

It should be noted that the trust for tort claimants would be subject to a channeling injunction that directs those claims to the trust and would preclude those claimants from pursuing the claims outside of the trust unless they opted out of the trust when voting on the plan. The U.S. trustee asked for additional information that explains the channeling injunction more directly so non-attorney parties could better understand it. Judge Shannon agreed with the trustee's request and said that a paragraph describing that aspect of the plan would be suffi-

cient. The trustee said that information was already included in the document, but wasn't in an easily understood format.

After addressing all of the objections, Judge Shannon said the disclosure statement would be adequate and granted approval of the document pending the ordered modifications. The judge stated:

*Having walked through each of the objections, I am prepared to find the disclosure statement satisfies the requirements of the bankruptcy code.*

The complex plan of reorganization proposed by Takata would see the bulk of its assets sold to competitor Key Safety Systems for about \$1.6 billion, with most of the proceeds going to satisfy restitution obligations imposed by the U.S. Department of Justice (DOJ). The government settlement calls for a restitution fund of \$850 million to pay claims to OEMs financially harmed by the debtor's faulty airbags and a \$125 million fund to cover personal injury and wrongful death claims. A federal judge in Michigan appointed a special master to oversee distributions of those funds. The plan would also create the personal injury and wrongful death trust, funded by the debtor and the OEMs, to satisfy the hundreds of claims made by those injured or killed as a result of the faulty airbags.

Takata will reorganize around its retained assets and the company will continue operations for several months to complete the manufacture of replacement airbag kits to satisfy the recall of millions of vehicles with the faulty airbags. The company filed for Chapter 11 protection in June of 2017. This came after the government investigation into Takata's faulty airbag inflator devices resulted in the DOJ settlement. The defect led to the largest recall in American automotive history and has been directly implicated in a dozen deaths.

A hearing on confirmation of its proposed Chapter 11 plan is set to begin on the 13<sup>th</sup> of this month. If you need more information on the effect of the bankruptcy in claims, contact Chris Glover, a lawyer in our firm's Personal Injury & Products Liability Section, at 800-898-2034 or by email at Chris.Glover@beasleyallen.com. Chris is handling claims against Takata and several automakers involving the defective airbags.

Source: Law360.com

## **VW SETTLEMENTS SHOULD NOT AFFECT EMISSIONS SUITS**

We have reported extensively on the blatant cheating by Volkswagen, Audi and Porsche relating to the installation of illegal "defeat devices" to cheat on vehicles' emissions tests. Two counties in Florida and Utah have asked a California federal court to keep alive their claims against the automakers in multidistrict litigation. The claims are not barred by the Clean Air Act or by settlements Volkswagen previously reached.

The Environmental Protection Commission of Hillsborough County, Florida, and Salt Lake County, Utah, asked the court to reject the automakers' bid to have their suits dismissed. The past settlements or fines paid by Volkswagen should not be a viable reason to deny the counties' claims.

Volkswagen should be fined as much as \$5,000 a day for its eight years of misconduct, and is now paying less than half that, the counties claimed. Salt Lake County's lawyer Colin King of Dewsnup King Olsen Worel Havas Mortensen told Law360:

*These defendants have paid nothing to these counties; the fact the defendants have settled with others does not justify them escaping accountability under our laws they intentionally and fraudulently violated and for the harm they caused to the counties and our county residents.*

The counties correctly take the position that Volkswagen's past settlements can be taken into account if the trier of fact and courts are ultimately tasked with determining an appropriate amount to pay the counties, but the mere existence of those past settlements should not bar the counties' claims. The counties also contended that their claims are not preempted by the Clean Air Act (CAA), as Volkswagen had claimed. The CAA essentially created a partnership between the state and federal authorities when enforcing emissions standards, and the U.S. Environmental Protection Agency (EPA) has "encouraged" states to enforce their own laws against tampering with emission control systems, the counties argued.

By cutting the EPA's budget, the Trump administration has required the states to take a large role in enforcing the Clean Air Act. As subdivisions of Florida and Utah, the counties therefore have a responsibility to regulate air pollution. By

tampering with its vehicles' emissions controls for nearly a decade, VW made it more difficult for the counties to attain baseline air quality standards, cheated the effectiveness of their inspection and maintenance programs and threatened the health of their citizens.

Volkswagen representative Jeannine Ginivan said in a statement that the court previously rejected claims by the state of Wyoming for being preempted by federal law, and should consequently reject these local claims as well. But Hillsborough County, represented by Archie Grubb, a lawyer with Beasley Allen, says the difference is that that the vehicles in this instance were subject to post-sale emissions control changes. Archie stated:

*The post-sale modification issue was not addressed in the Wyoming order, and we believe these modifications to used Volkswagen vehicles remove Hillsborough's claims from the umbrella of Clean Air Act preemption.*

The counties also countered Volkswagen's contention that their regulations don't apply to its conduct. It should be noted that a Utah regulation bars anyone from tampering with emission control devices, and a Hillsborough County regulation bars the installation of defeat devices.

Hillsborough County is represented by Dee Miles and Archie Grubb from our law firm, along with Gardner Brewer Martinez-Monfort PA and the Law Office of Thomas L. Young PA. Salt Lake County is represented by the Office of the Salt Lake County District Attorney and Dewsnup King Olsen Worel Havas Mortensen. The case is *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, (case number 3:15-md-02672), in the U.S. District Court for the Northern District of California. If you need additional information on this subject, contact Archie Grubb, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at Archie.Grubb@beasleyallen.com.

Source: Law360.com

#### **VW, AUDI AND PORSCHÉ AGREE TO \$235 MILLION CANADIAN EMISSIONS SETTLEMENT**

Volkswagen Canada, Audi and Porsche have agreed to pay CA\$293 million (\$235 million) to settle class claims alleging they rigged vehicles to cheat emissions

tests and to end the investigation by the Canadian Competition Bureau, an independent law enforcement agency, into their marketing practices. If approved by the courts, the settlement will divide up CA\$290.5 million between 20,000 Canadian drivers and lessees of certain 3.0-liter diesel vehicles in buyback, repair and restitution payments.

The bureau also reached a consent agreement with Volkswagen Group Canada Inc. and its Audi unit that requires the automakers to pay a fine of CA\$2.5 million. The government and automakers negotiated the fine after the bureau found that Volkswagen and Audi misled consumers into falsely believing their vehicles had "clean" diesel engines with lower emissions than their gasoline counterparts. The bureau also found that Porsche Cars Canada Ltd. misled consumers by claiming their vehicles complied with federal emissions standards.

In December 2016, Volkswagen Canada also reached a CA\$2.1 billion settlement, one of the largest consumer settlements in the country's history, to resolve class claims with about 105,000 owners of vehicles that have certain 2.0-liter diesel engines. At the time, the automaker also agreed to pay a CA\$15 million penalty.

The settlement covers 2013-2016 Volkswagen, Audi and Porsche Cayenne 3.0L diesel vehicles, according to a Volkswagen statement. It also provides cash payments to owners and lessees of 2009-2012 Volkswagen and Audi 3.0L diesel vehicles, as well as other buyback, trade-in and early lease termination options.

The consumers were represented by Reidar Mogerma of Camp Fiorante Matthews Mogerma LLP, Michael Peerless of McKenzie Lake Lawyers LLP, Sylvie De Bellefeuille of Option Consommateurs and David Assor of Lex Group Inc.

Source: Law360.com

#### **OLD STANDARDS HOLDING BACK AUTO SAFETY ADVANCEMENT**

Federal regulators' failure to routinely update motor vehicle standards to keep up with technological advancements and industry best practices hampers the deployment of safer driving technology, including automated or self-driving cars, according to a report released on Jan. 9. The Competitive Enterprise Institute (CEI), a Washington, D.C.-based nonprofit public policy organization, says Congress should require updates to the Federal Motor Vehicle Safety Standards (FMVSS)

when new so-called voluntary consensus standards are put out by private organizations that have historically developed and recommended safety and design standards for the automotive industry. The study correctly states that Congress does not require updates. The private organizations that develop standards include the Society of Automotive Engineers, the American National Standards Institute and the American Society for Testing and Materials.

In its "Modernizing Federal Motor Vehicle Safety Standards" report, CEI says regulators' failure to revise outdated standards that have been locked into law ultimately denies manufacturers and consumers the latest in vehicle production practices and technologies, many of which are intended to boost safety. The report says:

*The current failure to modernize motor vehicle safety regulations to reflect the latest consensus technical standards denies American automakers and consumers superior and likely safer vehicle technologies. With the deployment of automated vehicles on the horizon and their promise of far safer driving, failing to address this problem could result in legal prohibitions on safer technologies, which would needlessly result in increases in automotive fatalities, injuries, and property damage.*

The report singles out one such standard in the FMVSS related to headlamps that requires cars to have separate and distinct high and low beams. It's an outdated standard, according to CEI, that blocks car manufacturers from installing adaptive driving beam, or ADB, headlamps that can automatically adjust beams to minimize glaring light toward oncoming and leading vehicles.

As a result, the report says, American consumers are being denied "superior and likely safer headlamps" that have already been available in Europe for years. Marc Scribner, CEI senior fellow and author of the report, said in a statement:

*When it comes to auto safety standards, regulators must be faster to revise regulations so that they stay current with rapidly changing technology and don't prolong hazardous situations for decades.*

CEI says Congress should enact a regulatory-update trigger mechanism for

FMVSS, so that whenever there's a revision to voluntary consensus standards incorporated into federal regulations, the National Highway Traffic Safety Administration (NHTSA) would have to start the process for amending the applicable regulations or explain why it's choosing not to do so. The report says:

*It is without dispute that the outdated voluntary consensus standards incorporated throughout the Code of Federal Regulations pose a policy challenge. If private standards are to be used in lieu of government unique standards—and there is a strong argument for doing so—regulatory agencies must do a better job of ensuring that regulated entities are governed by modern best practices.*

Congress has largely neglected to address the problem involving outdated standards. The lawmakers have the responsibility to design legislative mechanisms to keep up with technological advancements and industry standards. Outdated standards can be used by automakers to the disadvantage of people who deserve safety on our highways. Quite often the standards require much less than the internal standards followed by automakers.

Source: Law360.com

### III. PURELY POLITICAL NEWS & VIEWS

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#### THE NATIONAL SCENE

I don't believe we have seen in many years a more confused and unstable situation in our nation's capital. In fact, it may well be the worst ever. Sadly, things may get worse if that's possible. The Trump Administration has an agenda that favors the rich and powerful, with little if any regard for middle-income families and for the poor among us. All of this is a recipe for a national disaster. It's disturbing to see capable members of the House and Senate either marching in lock step with the president or sitting back quietly and allowing bad things to happen. Political courage is a rare commodity in Washington these days. We need more folks like Richard Shelby, Lindsey Graham, and Dick Durbin in the U.S. Senate.

#### A POLITICAL YEAR IN ALABAMA

There will be a number of statewide offices up for election this year, including governor, lieutenant governor and other executive offices. House and Senate seats will also be on the ballot. A number of judicial positions are up for election, including the chief justice of the Alabama Supreme Court and several more appellate seats.

#### THE ALABAMA LEGISLATURE MUST BALANCE WORK AND POLITICS

It's been said that a political year with the Alabama Legislature in session makes lots of folks in my home state very nervous. Hopefully, the performance by members of the House and Senate this year will negate any apprehension over the lawmakers being in Montgomery. The leadership of both chambers appears to be dedicated to getting down to work and having a successful session. I believe this will be a good session and hopefully that will be the case.

### IV. LEGISLATIVE HAPPENINGS

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#### THE ALABAMA LEGISLATURE COMES TO TOWN

The Regular Session of the Alabama Legislature started on Tuesday, Jan. 9 and this Legislature will face lots of problems that badly need to be addressed. The members of the House and Senate are hoping for a quick session that will allow them to get on the campaign trail for state elections in November. However, there are several critical issues that can't be ignored.

This is an election year in Alabama for all 140 legislative seats, and also for the governor's office and other statewide offices. Campaign considerations are bound to influence what legislation is proposed and passed during the session. Gov. Kay Ivey gave her first State of the State address outlining her agenda and she hit a home run. While it was a politically charged talk, it didn't come across as "political." Instead, it was a combination of concern and sincerity in laying out a plan for our state.

While the upcoming elections will be on their minds, the Legislators must first

focus on the state's two budgets. That has to be the top priority. The Legislature must also address issues ranging from prison health care to the state's Children's Health Insurance Program. Both issues were discussed by Gov. Ivey in her State of the State address. The Governor did a tremendous job of setting out her agenda for the 2018 legislative session. The following are some of the more important items on that agenda:

- Supporting Alabama's education system from Pre-K to the workforce will be a priority;
- Ensuring the needs of our state's rural citizens are being met and providing proper care and facilities to those incarcerated in Alabama; and
- Badly needed pay raises for state employees and teachers. Alabama state employees have not received a cost-of-living increase since 2009. Alabama teachers and education employees have gotten two cost-of-living raises during that span.
- The Department of Corrections has asked for a \$30 million supplement to this year's budget and a \$50 million increase for next year. Most of the increase would go to expanding health care services for prisoners, a move prompted by a federal judge's ruling that mental health care is "horrendously inadequate." Corrections Commissioner Jeff Dunn said he does not expect a prison-building proposal this year. For the last two years, lawmakers have rejected plans to issue bonds to build prisons.
- Funding for the Alabama Medicaid Agency is always a key issue. Medicaid consumes more than one-third of the General Fund. Close to 1 million Alabamians receive some services from Medicaid. Slightly more than half are children. Lawmakers used \$105 million in BP oil spill money to prop up this year's budget and that won't be available for next year. A \$53 million carry-over into next year, however, will help offset Medicaid's need for state more money.
- Congress has not reauthorized funding for the Children's Health Insurance Program, known in Alabama as ALL Kids. Federal funds have fully paid for the program the last two years. If Congress does not fully fund it this year, Alabama lawmakers would have to

appropriate about \$53 million in state funds to sustain the program. That could significantly affect other programs, including the requested increase for prisons and pay raises for state employees and teachers.

Governor Ivey's goal for this legislative session is to invest in our state's future, provide for our people and to spend taxpayer dollars responsibly. I would give Gov. Ivey an A+ for her State of the State speech to the legislators and to the people of Alabama.

My hope is for a productive legislative session with a good number of long-standing problems being solved. Gov. Ivey has the ability, experience and intense desire to make positive things happen during this session of the legislature. I predict that she, with the help of the Legislative leaders, President of the Senate Dell Marsh and Speaker Mac McCutcheon, will be successful.

## V. COURT WATCH

### **\$1.7 MILLION VERDICT UPHELD BY ALABAMA SUPREME COURT IN DOLLAR GENERAL CASE**

The Alabama Supreme Court has upheld a \$1.7 million verdict for a customer injured by a fall in a Mobile County Dollar General store. On July 9, 2012, 60-year-old Deborah Revette slipped and fell at a Dollar General store in Mobile. She filed suit and the case was hotly contested for four years in Mobile County Circuit Court.

Ms. Revette was represented by the Cunningham Bounds firm. Her lawyers said that the woman had slipped in clear liquid laundry detergent and suffered leg and shoulder fractures that required multiple surgeries and nearly half a million dollars in medical bills. It was contended that the store bore the blame due to Dolgencorp corporate policy that allowed insufficient safety inspections.

The jury returned a verdict in favor of Ms. Revette and awarded her \$1,725,000 on Sept. 27, 2016. Dolgencorp filed notice of appeal in January 2017. On Jan. 12, 2018, the Alabama Supreme Court affirmed the verdict and the lower court ruling.

Source: AL.com

## VI. THE NATIONAL SCENE

### **DID WE LEARN NOTHING FROM THE BP SPILL? TRUMP WANTS TO EXPAND OFFSHORE DRILLING**

It is said that those who cannot remember the past are doomed to repeat it, and it appears the Trump administration has a short memory. In early January the administration unveiled a plan that would radically expand offshore drilling to all of America's coasts—from the west coast to the Arctic Ocean, to the east coast and the Gulf of Mexico.

When the Deepwater Horizon oil drilling platform exploded in 2010, it killed 11 workers and set off the biggest oil disaster in U.S. history. The BP Oil Spill released nearly a million gallons of diesel fuel into the Gulf of Mexico's waters, and threatened the livelihoods of commercial fishing and shrimping operations and the revenues of states and municipalities.

The move to allow new offshore oil and gas drilling would lift a ban on this type of drilling that was imposed by President Barack Obama in the wake of the BP Oil Spill. It also runs counter to the past administration's—and the world's—move toward a clean energy future, and undermines coastal communities already challenged by sea level rise and erosion.

If the plan goes forward, the Interior Department would open 25 of 26 regions of the outer continental shelf, 94 percent of which was blocked to drilling by the Obama administration. It would only spare the North Aleutian Basin, which President George Bush protected in an executive order.

The governors of nearly all coastal states including New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, California, Oregon, Washington and Florida have voiced their opposition to the proposed offshore drilling plans. They point to the risk drilling poses to their states' tourism, fishing and recreational industries.

Alabama is well familiar with those risks. In the wake of the BP oil spill, Alabama suffered the devastation of its beaches, tourism industry and businesses throughout the state, suffering substantial tax losses and environmental impacts. In 2015, Beasley Allen represented the State of Alabama and we reached an \$18.7 billion settlement with BP for damages

caused by the BP oil spill, the largest environmental settlement in U.S. history.

Florida was promised an exemption from offshore drilling by the new administration, but as of Jan. 18 had not received enough confirmation from Interior Secretary Ryan Zinke that he would honor that promise to rest comfortably. In response, Florida Sen. Bill Nelson was blocking confirmation of three Trump administration nominees until the issue is resolved to the state's satisfaction.

Do we really want to open the door to Big Oil to put its profits ahead of the health of our oceans, putting at risk the livelihoods and critical natural resources of generations? What do you say?

Sources: League of Conservation Voters, The Hill, *The New York Times*

### **PUBLIC CITIZEN CALLS FOR REVERSAL OF CITIZENS UNITED**

Last month was the eighth anniversary of the U.S. Supreme Court's unbelievably bad *Citizens United* decision. In the all-Trump, all-the-time media environment, it's easy to just consider that Trump alone is the source of all of our political problems, but that is not so. Even if Trump is impeached or elects to leave office, our democracy will remain in crisis. There is a root cause of the problems in Washington facing the American people and that is the unlimited spending in political races. Robert Weissman, President of Public Citizen, had this to say:

*So long as a handful of big money donors have outsized influence over who is elected and what is debated in Congress, our democracy will remain broken. And so too will the corporate oligarchy maintain the power to block or impede the policies favored by overwhelming numbers of Americans—from sharply raising the minimum wage to addressing catastrophic climate change, from breaking up Wall Street banks to expanding Medicare to cover everyone.*

I am not sure that regular everyday folks understand the adverse effect of *Citizens United* on our political system in this country. If we are going to solve the problem of "Big Money" dominance of our elections, we must overturn *Citizens United*. The Supreme Court has given corporations the same First Amendment rights that people have under the Constitution. That is impossible to justify.



There is very little reason to believe the currently constituted U.S. Supreme Court will overturn that heinous decision. Sadly, there is no reason to expect relief from the high court anytime soon, which makes Public Citizen's project to win a constitutional amendment to overturn *Citizens United* all the more vital.

In the shadow of Donald Trump's presidency, it is very easy to lose sight of the need to reverse *Citizens United*. Public Citizen's constitutional amendment movement, however, has made progress since the high court handed down its decision in 2010. Public Citizen reports:

- With Nevada approving a resolution this year, 19 states have passed resolutions or the equivalent supporting a constitutional amendment. That's half the total needed to win approval!
- More than 750 cities and towns across the country have approved resolutions in support.
- In 2014, there was majority support in the U.S. Senate for the amendment.
- Thousands of people turned out to protest *Citizens United* at the Democracy Awakening demonstration in Washington, D.C., in 2016, and tens of thousands have participated in similar protests and actions around the country.
- Millions of Americans have signed petitions calling for the amendment.

Public Citizen is the people's voice in our nation's capital. For eight years, Public Citizen has been leading the nationwide movement to rescue our democracy from billionaires and big business by working to overturn *Citizens United*. The advocacy group has helped to move the issue to the mainstream of political discourse, an achievement that seemed absolutely impossible to many at the time of the decision.

We badly need a 28<sup>th</sup> amendment to the U.S. Constitution to overturn *Citizens United*. Unfortunately, having to deal with a Congress and president who are taking things in the opposite direction, makes the job very tough, but not impossible. If you want more information on this important matter, go to [citizens.org](http://citizens.org) or call Public Citizen toll free at 800-289-3787.

Source: Robert Weissman, President, Public Citizen

### **THE FDA MAKES DRUG AND DEVICE MAKERS HAPPY RELATING TO OFF-LABEL POLICY**

The U.S. Food and Drug Administration (FDA) has once again delayed a new policy related to off-label promotion. When the drug and device makers that have decried the agency's approach are happy that's not a good sign. This move marked the third delay of a new FDA policy for assessing the "intended use" of drugs and devices. The concept looks at whether products are intentionally being promoted for unapproved uses, which can lead to criminal misbranding charges or False Claims Act (FCA) liability. In a proposed rule on Jan. 12, the FDA said it intends to delay the new policy "until further notice." The move follows a six-week delay announced in February and a one-year delay announced in March.

The disputed policy was contained in a broader final rule regarding intended use and tobacco regulation. Under the policy, regulators said they would consider "the totality of the evidence" when assessing intended use. Industry groups quickly objected calling the approach "vague and overbroad."

Although industry groups praised the delay, their ultimate goal is to prevent the "totality of the evidence" standard from ever taking effect. The FDA has acknowledged the opposition, but cautioned that its delay "should not be construed to indicate that FDA has made any decisions" about the policy's future. Hopefully, the FDA will continue to work diligently on the issues relating to intended use raised in the underlying rulemaking and will remain committed to rulemaking on this issue. Comments on the proposed delay will be accepted until Feb. 5. Hopefully, the FDA will not be adversely influenced by the powerful drug and device manufacturers and will protect consumers in this matter. There have been far too many abuses involving off-label use of drugs and medical devices.

Source: [Law360.com](http://Law360.com)

## VII. THE CORPORATE WORLD

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### **FEDERAL JUDGE ISSUES RULING IN 2009 COLONIAL BANK COLLAPSE LITIGATION**

A federal judge has ruled that PricewaterhouseCoopers was negligent in the events that led to the 2009 collapse of Colonial Bank. The judge found that the world's second-largest professional services firm could have done more prior to the bank's failure, which was caused by a \$2 billion fraud perpetrated by Florida-based mortgage lender Taylor Bean & Whitaker.

In a 93-page decision issued last month, U.S. District Judge Barbara Jacobs Rothstein wrote that Colonial was victimized by "one of the largest and longest-lasting bank frauds in American banking history," which PwC failed to detect. This led to a \$2.8 billion cost to the Federal Deposit Insurance Corp., which sued PwC after it had given Colonial Banc-Group "clean audits" for years. However, many of Colonial's loans to Taylor Bean & Whitaker were secured against non-existent assets, leading to the failure during the economic recession that began in 2008. The jury's decision means PwC could potentially face hundreds of millions of dollars in damages. Colonial was one of the 25 biggest banks in the U.S. at the time of its collapse, with more than \$26 billion in assets and offices in Alabama, Georgia, Florida, Nevada and Texas.

Judge Rothstein rejected four of the five main claims made by the FDIC and Colonial, and that numerous employees at the bank "actively and substantially interfered" with its audit. PricewaterhouseCoopers says it "looks forward to the damages phase where the FDIC will bear the burden of proof on what remains of their inflated damages claim. Lee Farkas, the former chairman of Taylor Bean & Whitaker, went to prison over the fraud. Investigators found TBW was running up overdrafts in the account it used to fund mortgages and Colonial employees hid them from regulators and auditors. Several Colonial employees also went to prison as a result of the case. Colonial was seized by the government as

insolvent and sold to North Carolina-based BB&T Corp.

Source: AL.com, *Wall Street Journal* and *The Tampa Bay Times*

## VIII. WHISTLEBLOWER LITIGATION

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### **POTENTIAL GOVERNMENT CONTRACT CASE TRENDS IN 2018**

Following the U.S. Supreme Court's landmark *Escobar* decision two years ago, many False Claims Act (FCA) issues remain unsettled. As a result, 2018 will bring prominent challenges to a national security-related contracting ban, as well as potential litigation over enormous recently awarded and imminent federal deals. Government contractors would be wise to watch out for these cases in the coming year. Last year saw a number of important contracts rulings, and 2018 will likely see more of the same. The following describes some of the most prominent cases and potential legal battles to stay alert for in 2018:

#### **Post-Escobar Cases**

In the *Escobar* decision, the U.S. Supreme Court approved implied false certification as a basis for False Claims Act liability. This ruling established that claims can be brought against companies for mistakenly implying that they are meeting the "contractual, regulatory and statutory requirements by submitting claims for payment." However, lower courts are left with two new unsettled issues: whether it is mandatory to apply the two-part test for falsity of claims outlined in the opinion, and how to determine if an alleged false claim is "material" to government payment. Despite dozens of post-Escobar decisions in the district and circuit courts, there is still no consensus on these issues.

More post-Escobar will be decided in 2018, hopefully bringing more clarity to FCA relators and Defendants. Perhaps the most prominent will be *U.S. ex. rel. Rose et al. v. Stephens Institute*, a recently argued case in the Ninth Circuit. This case involves allegations that Stephens Institute, an Academy of Art University, paid illegal bonuses to student recruiters. The circuit court will address both the

two-part test and the materiality standard.

#### **Medical Necessity and Potential First Cybersecurity FCA Case**

The health care industry remained a leading source of government FCA recoveries in 2017. Medical necessity in particular remains one of the largest uncertain FCA issues. This past March, the Eleventh Circuit heard oral arguments for *U.S. v. GGNSC Administrative Services et al.*, and is poised to make a ruling on the issue. That case alleges hospice company AseraCare Inc. illegally billed the government for services to patients who were not terminally ill. The district court found that the issue was based on a difference of opinion about hospice care eligibility. Additionally, the AseraCare case could see a ruling on the unresolved issue of statistical sampling, which is allowing damages or liability to be estimated based on a sample of claims.

On another note, 2018 may see the first ever cybersecurity-based FCA case. The federal government has increased its emphasis on cybersecurity over the past few years, and the Department of Defense amended the Defense Federal Acquisition Regulation Supplement (DFARS) in 2017 to require contractors to "protect controlled information and promptly report breaches." According to many lawyers in this area of practice, this is a particularly likely source of potential liability because many federal contractors struggled to implement their compliance plans by the Department of Defense's (DOD's) Dec. 31, 2017, deadline. The high number of people within organizations responsible for DFARS compliance will most likely be more whistleblowers making claims under the False Claims Act.

#### **Competing Preference Programs**

In its 2016 *Kingdomware* decision, the U.S. Supreme Court ruled that under a 2006 statute, the U.S. Department of Veterans Affairs must give preference on contracts to veteran-owned small businesses (VOSBs) "where at least two small businesses are expected to bid on a contract" that can do the work at a reasonable price. While the ruling was a victory for VOSBs, it conflicts with the federal agency's requirement to give preference for certain products and services to businesses that are part of the AbilityOne program, nonprofits that employ blind or significantly disabled individuals.

These businesses now find their fate hanging in the balance as the Court of Federal Claims recently found in *PDS Consultants Inc. v. U.S.* that "VOSBs must be given preference over AbilityOne contractors for VA contracts," resulting in an appeal to the Federal Circuit. According to the AbilityOne Commission, more than \$3.3 billion in purchases were made through the AbilityOne program, and the circuit court's ruling could have an existential impact on the program.

#### **Federal Contracting Ban Challenges**

In September of last year, the U.S. Department of Homeland Security (DHS) directed federal civilian agencies to stop using antivirus software from AO Kaspersky Lab because of security concerns that the company may have ties to the Russian Government. Kaspersky sued DHS on Dec. 18, stating it has claimed for months that it does not collaborate with the Russian government and claiming it was not given a fair chance to respond before DHS issued the ban.

Kaspersky has minimal direct government sales, but "its software is embedded in several other manufacturers' hardware solutions that are used by the government." In broad terms, this case will likely give both the government and federal contractors with foreign operations a better idea of "where they stand in regard to similar potential bans from contracting outside of the formal debarment system." The case is in the U.S. District Court for the District of Columbia, *Kaspersky Lab Inc. et al. v. Department of Homeland Security et al.*, case number 1:17-cv-02697.

#### **Bid Protests and Post-Disaster Contracting Enforcement**

It's fairly common when agencies announce a large contract award for unsuccessful bidders to make legal challenges. This was best "demonstrated by a series of bid protest challenges to the U.S. General Services Administration's recent \$50 billion multiaward Alliant 2 information technology contract." Further, the DOD's fifth repetition of its multiaward Logistics Civil Augmentation Program contract, or LOGCAP V, is expected to be the largest single contract award in 2018. While the fifth iteration will not be quite as lucrative as LOGCAP IV, awarded in 2007, "it will still be worth up to \$82 billion over a decade," making it ripe for legal challenges.

In addition, litigation under the FCA or as a criminal action is highly likely with respect to the emergency contracting following the string of hurricanes and wildfires in 2017, because contractors will struggle to completely comply with the law in these exigent circumstances. With “Congress poised to provide more than \$130 billion in overall federal disaster relief funds,” many lawyers say that long-term disaster recovery and reconstruction contracts will likely see many of their own legal challenges in 2018.

Further, federal agencies have recently taken an aggressive stance regarding access to contractors’ technical data. This could result in new bid protest litigation in 2018.

Source: Law360

#### **WHISTLEBLOWER HELPS MISSISSIPPI WIN RECORD FALSE CLAIMS ACT SETTLEMENT**

A Mississippi mental health facility has agreed to pay the U.S. government and the state’s Medicaid program nearly \$7 million to settle a whistleblower lawsuit alleging it billed Medicaid for preschool day-treatment services that it never provided or that were provided by unqualified personnel. Region 8 Mental Health Services, a publicly funded mental health center based in Brandon, Mississippi, that provides mental health services across five state counties, will pay the Mississippi Division of Medicaid \$6.93 million to resolve the whistleblower allegations. The settlement is believed to be the largest False Claims Act health care settlement in Mississippi history, U.S. Attorney Mike Hurst said.

The Mississippi Department of Mental Health reports that nearly 35,000 Mississippi children and adolescents suffer mental health issues that are “severe and persistent.” The state’s Medicaid program defines day treatment as “a behavioral intervention program, provided in the context of a therapeutic milieu, which provides children/adolescents with serious emotional disturbances the intensity of treatment necessary to enable them to live in the community.” Day Treatment services covered by Medicaid provide a vital service to the citizens of Mississippi, enabling the State’s youth to live productive lives and grow to become healthy, productive adults.

The case against Region 8 started after a former employee filed a lawsuit on behalf of the U.S. and state governments under the whistleblower provisions of

the False Claims Act, which allows private parties to sue on behalf of the government in cases of fraud. The whistleblower’s allegations were investigated by the U.S. Department of Justice and the Department of Health and Human Services, Office of Inspector General, which discovered that many of the claims Region 8 submitted for payment from 2004 to 2010 were for services that were never provided or were provided by unqualified staff. The federal and state governments backed the whistleblower’s claims. U.S. Attorney Hurst said in a statement:

*Our children are among the most valuable and vulnerable in our society, and it is imperative that we do all that we can to protect the programs that offer them the services that they need. The work we do in combatting waste, fraud and abuse in government programs is among some of the most important work this office does, and we will continue to vigorously investigate all allegations of fraud.*

The whistleblower who initiated the False Claims Act complaint against Region 8 will receive more than \$1 million as a whistleblower award for helping the U.S. and the State of Mississippi recover taxpayer funds.

Source: U.S. Department of Justice

#### **KMART SETTLES WHISTLEBLOWER LAWSUIT OVER DRUG OVERCHARGES FOR \$32 MILLION**

Kmart Corporation, a wholly owned subsidiary of Sears Holdings Corporation, has entered into an agreement with the United States Government to settle a whistleblower lawsuit by paying the government \$32 million. The claims are that Kmart stores with in-store pharmacies failed to report discounted prescription drug prices to Medicare Part D, Medicaid and TRICARE, the health program for members of the U.S. uniformed services and their family members.

The claims were brought under the *qui tam* provisions of the False Claims Act (FCA). For those who may not know, the *qui tam* provisions of the Act allows private citizens with knowledge of fraud committed against the government to “blow the whistle” on the parties committing the fraud and bring a civil action on behalf of the U.S. government. The person bringing the suit is known as the “relator” and is permitted to share in any

recovery obtained on behalf of the government.

In the Kmart case, the lawsuit was filed in 2008 by a *qui tam* relator named James Garbe. Originally, the lawsuit was filed in federal court in Los Angeles, California, but was later transferred to the United States District Court for the Southern District of Illinois. In the *qui tam* lawsuit, Garbe alleged that Kmart pharmacies offered discounted generic drug prices to cash-paying customers through various club programs but knowingly failed to disclose those prices when reporting to federal health care programs its usual and customary prices, which are typically used by those programs to establish reimbursement rates.

The settlement agreement with the United States is part of a global \$59 million settlement that includes a resolution of state Medicaid and insurance claims against Kmart. Garbe, the *qui tam* relator, litigated the case after the government declined to intervene in the lawsuit and he will receive \$9.3 million. Donald S. Boyce, U.S. attorney for the Southern District of Illinois, stated:

*Pharmacies and other providers who receive funds from taxpayers have a duty to follow the law. If health care providers do not provide fair and transparent pricing as required under the law, the False Claims Act allows the government and whistleblowers to ensure that the Medicare, Medicaid, and TRICARE programs are made whole.*

Acting Assistant Attorney General Chad A. Readler, on behalf of the Department’s Civil Division, added this statement:

*This settlement should put pharmacies on notice that there will be consequences if they attempt to improperly increase payments from taxpayer funded health programs by masking the true prices that they charge the general public for the same drugs.*

It’s quite apparent there is widespread cheating and outright fraud involved in many federal programs. This is especially true in programs such as Medicaid. This is why whistleblowers are so critically important today to protect taxpayers.

## **DENTAL CARE COMPANY TO PAY \$23.9 MILLION IN WHISTLEBLOWER SETTLEMENT**

A dental management company and more than 130 of its affiliates in 17 states have agreed to pay \$23.9 million plus interest to settle civil charges that they fraudulently billed the government for medically unnecessary dental services performed on children. The U.S. Department of Justice (DOJ) announced the settlement last month. It's very sad to learn that the claims involved medically unnecessary dental services performed on children.

Kool Smiles dental clinics and their parent company, Benevis, formerly known as NCDR, based in Marietta, Georgia, violated the federal False Claims Act (FCA) by billing state Medicaid programs for medically unnecessary baby root canals, tooth extractions and stainless steel crowns, as well as baby root canals that were never performed, according to the Justice Department.

It appears that from January 2009 to December 2011, the Kool Smiles clinics also routinely pressured and incentivized dentists to meet production goals through a system that disciplined "unproductive" dentists and rewarded "productive" dentists with substantial cash bonuses based on the revenue generated by the procedures they performed. The DOJ said that the clinics ignored complaints about the practice from their own dentists.

Three whistleblowers who filed the False Claims Act lawsuits—former Kool Smiles employees Adam Abendano, Poonam Rai and Robin Fitzgerald—will receive a combined \$2.4 million for their share of the recovery. Of the nearly \$24 million payment, about \$14.2 million will go to the federal government and about \$9.7 million to the states. Five lawsuits filed under the whistleblower provision of the False Claims Act started the investigation. Four cases are pending in the District of Connecticut and one is pending in the Western District of Texas.

Source: Law.com

## **WELLS FARGO SETTLES WHISTLEBLOWER'S RETALIATION CASE**

Wells Fargo & Co. has reached a settlement with a former branch manager who claimed she was fired for blowing the whistle on employees who had been opening accounts without permission. The sales-pressure conduct at issue was a

scandal that erupted in 2016. The settlement, finalized on Jan. 12, brought an end to Wells Fargo's appeal of a U.S. Department of Labor order compelling the bank to reinstate the fired branch manager, Claudia Ponce de Leon, and pay her \$577,500 in back wages, damages and legal fees. That decision came almost a year after Wells Fargo reached a \$185 million settlement with federal regulators and the Los Angeles City Attorney's Office resolving allegations over the widespread misconduct at the bank.

Wells Fargo and Ponce de Leon are to submit a copy of the settlement agreement by Feb. 9. The settlement has a confidentiality agreement.

Even though the Ponce de Leon matter is behind the bank, Wells Fargo has a wider whistleblower problem on its hands. In a regulatory filing last year, Wells Fargo said it is facing "multiple single Plaintiff Sarbanes-Oxley Act complaints and state law whistleblower actions filed with the Department of Labor or in various state courts alleging adverse employment actions for raising sales practice misconduct issues."

## **A MOST USEFUL CLE PROGRAM IN MONTGOMERY**

If you would like to learn more about whistleblower claims, Andrew Brashier from our firm will be speaking at "The False Claims Act Today," a CLE program hosted by the Federal Bar Association *Qui Tam* Section, with support from the Association's Montgomery Chapter. The program is set for March 7, and will start at 11:30 a.m. CT, at the Frank M. Johnson U.S. Courthouse Complex in Montgomery, Alabama.

This seminar will feature Assistant U.S. Attorneys from three separate federal districts, Jerusha Adams (M.D. Ala.), Deidre Colson (S.D. Ala.), and Don B. Long III (N.D. Ala.); as well as The Honorable W. Keith Watkins, Chief Judge of the U.S. District Court for the Middle District of Alabama; and Defense counsel Thomas K. Potter III of Burr & Furman. Registration information is available at fedbar.org. I will say more on this seminar in another section of this issue.

## **YOU CAN BE A WHISTLEBLOWER**

Are you aware of fraud being committed against the federal government, or a state government? If so, you may be protected and rewarded for doing the right

thing by reporting the fraud. If you have any questions about whether you qualify as a whistleblower, please contact an attorney at Beasley Allen for a free and confidential evaluation of your claim. There is a contact form on our firm's website (Beasleyallen.com) or you may email one of the lawyers on our whistleblower litigation team: Archie Grubb, Larry Golston, Lance Gould or Andrew Brashier. You may contact one of the lawyers by phone 800-898-2034 or by email at Archie.Grubb@beasleyallen.com, Larry.Golston@beasleyallen.com, Lance.Gould@beasleyallen.com or Andrew.Brashier@beasleyallen.com.

## **IX. PRODUCT LIABILITY UPDATE**

### **PRODUCTS LIABILITY & PERSONAL INJURY SECTION LITIGATION UPDATE**

Lawyers in our firm's Products Liability & Personal Injury Section handle cases involving catastrophic injuries and deaths arising out of any type of accident, including car crashes, 18-wheeler accidents and industrial and workplace accidents. We have learned over the years that many potential product liability claims are overlooked by all too many lawyers when investigating what many view as routine accidents.

In many motor vehicle crashes, some defect—either design or manufacturing—played a major role in causing the accident. A product liability claim focuses on whether or not the product is defective. An entire product may be defective, or it may be that a component part of the product contains the defect. The product may well contain design, manufacturing, or warning defects. In some cases, it will be a combination of these problems.

Personal injury claims that don't involve a defective product include heavy truck litigation, slip and falls and automobile accidents. Below are just a few of the type cases lawyers in the Section handle on a regular basis.

### **Cab Guards**

A hundred thousand pounds of timber travels down the county roads and Interstates of this country. Most folks do not realize just how dangerous these loads are to the hard-working log truck driver

tasked with delivering these loads to the sawmills and papermills. Most drivers themselves are often not aware of the danger they are in from not being properly protected from their heavy cargo.

Cab guards are supposed to be protecting these drivers. The shiny, metal pieces positioned behind the cab of almost every log truck in the United States are purchased with the belief they will protect cab occupants from cargo shifting forward and crushing the cab during a crash.

Cab guards, however, are woefully and inadequately designed because manufacturers use weak aluminum instead of a stronger metal like steel. Lawyers in our firm have successfully handled a number of cases over the years involving defective cab guards on big log trucks or any big truck hauling large and heavy loads. For more information about cab guards and trucking injuries, contact LaBarron Boone or Ben Baker in our Montgomery office at Labarron.Boone@beasleyallen.com, Ben.Baker@beasleyallen.com or Chris Glover in our Atlanta office at Chris.Glover@beasleyallen.com. You can call these lawyers at 800-898-2034.

### **Takata Airbags**

The drip, drip, drip of recalls related to one of the worst worldwide automotive manufacturing fiascos in recent history continues. Just this week, Takata added an additional 2.7 million airbags to its recall list that apply to vehicles produced by Ford, Mazda and Nissan. During this same time, Honda confirmed another death connected to the exploding airbags, bringing the total number of confirmed fatalities in the U.S. linked to the Takata inflators to 12. In late February, Takata pled guilty and agreed to pay \$1 billion for concealing a defect in millions of its airbag inflators.

The potential dangers posed by these air bags are that the airbags can unexpectedly explode with excessive force, causing serious injury or death to occupants. The defect is linked to the air bags' inflator systems, which can shoot metal fragments from the devices into the car like shrapnel. Airbags on both the driver's and passenger's side can explode, even as a result of a fender bender or other minor collision. Tokyo-based Takata is one of the world's largest automotive suppliers. It manufactures airbags, safety belts, steering wheels and other auto parts for a variety of automakers. Vehicles containing the defective airbags include certain models made by Toyota, Honda,

Mazda, BMW, Nissan, Chrysler, Audi, Volkswagen and General Motors. Cole Portis and Chris Glover in the Section are involved in these cases.

### **Heavy Trucking Accidents**

There are significant differences between handling an interstate trucking case and other car wreck cases. It is imperative to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records. Expert testimony is of utmost importance. Accidents involving semi-trucks and passenger vehicles often result in serious injuries and wrongful death. Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations.

Chris Glover, a lawyer in the Section, has represented numerous folks who have been seriously injured or lost a family member as a result of the wrongful conduct of a trucking company. He most recently wrote and had published a book that explains how to properly litigate a heavy trucking case. The book is titled *An Introduction to Truck Accident Claims: A Guide to Getting Started*. The book covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential Defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as hours of service, fatigue, maintenance and products liability. This book is available free to lawyers in either hard copy or downloadable digital format. For your free hard copy, call Sloan Downes, Section Director, at 800-898-2034 or by email at Sloan.Downes@beasleyallen.com. The book also can be downloaded at [www.beasleyallen.com/books](http://www.beasleyallen.com/books).

### **Tire Defects, including RV Tires**

Tire failure can result in a serious car crash causing serious injury or death to the car's occupants. Air, heat and sunlight can cause the rubber in tires to break down. When a tire is defective, potentially serious problems like detreads and blowouts can occur long before the tire would be expected to wear out. If the tire failure is the result of design or manufacturing defects, and the manufacturer is aware of the problem, they have an

obligation to alert consumers to the potential danger.

An often overlooked area of tire litigation relates to tires manufactured for RVs. A large RV typically seats up to six people and has a kitchen, living area, bathroom and bedroom. Many are loaded with pricey extras such as ceramic floors, granite countertops and slide out sections that enlarge the motor home when it is parked at a campground.

These heavy loads, coupled with weight-shifting inside the RV, put too much pressure on tires that are inadequate for the load, resulting in sudden tire failures. The problem is that RV manufacturers under-rate the axle weight of their vehicles and equip them with tires that can't bear the load. The tire failures typically occur in the front end of the RV, which has only single tires on each side instead of doubles. This is particularly dangerous because a front-wheel blowout makes it almost impossible to steer.

The risk is compounded when the RV owners load their vehicles with luggage, food, gasoline and passengers. Also, because many RVs are used only a month or two a year, the tires are often old, heightening the risk of tread separation. The tire will pass inspection because the tread depth is fine, but it's being run during the summer during high ambient temperatures. It may be five or six years old, and it's not really designed for the application for which it's being used. Those factors combined are a recipe for disaster.

Lawyers in the Section have pursued numerous claims against both tire manufacturers and importers of the defective Chinese tires. If you have questions regarding a potential tire case, contact Cole Portis or Ben Baker at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Ben.Baker@beasleyallen.com.

### **Bad Boy Buggy Litigation**

Lawyers in the Section continue to handle cases involving injuries from the off-road vehicle known as the Bad Boy Buggy. The Buggy was initially designed by a gentleman who owned an auto salvage yard in Natchez, Mississippi, but the company was sold a couple of times and now is owned by Textron, Inc.

The Bad Boy Buggies are currently marketed for hunting and utility work but they are designed very poorly. They are unstable on uneven terrain. The static stability factor of the Bad Boy vehicles is very low, which is caused by a design that has a narrow track width and a high

center of gravity. The vehicles are also very heavy primarily because of the weight of the numerous batteries located internally. When the Bad Boy vehicle turns over, it has the potential to cause significant injuries.

As of today, the Bad Boy Buggies are still not equipped with doors or adequate measures to prevent “leg-out injuries.” Yamaha performed a recall on all of its Rhino vehicles in 2007 because it was seeing numerous leg-out injuries when the vehicles tipped over. The primary problem was that, in a side-by-side vehicle, the driver or passenger will reflexively put their foot out as the vehicle tips. The vehicle typically still has forward momentum as the tip-up occurs, so as the occupant plants his foot on the ground, the foot/leg will be pulled under the backside of the vehicle. Quite often, this causes severe fractures and even amputations.

While Bad Boy has now upgraded its design to add a shoulder net and seatbelt, its foot-out protection is still very bad. Textron added a trip bar in the foot well area, which it claims is a foot-out preventative device. But Textron has performed no testing on the vehicle to see if the trip bar is effective. The vehicles have no protection for occupants who are younger, or of short stature, because their legs may not be long enough to reach the area where the leg-out device is located. These vehicles need doors and netting to prevent leg-out and arm- and hand-out injuries.

Hopefully, Textron, Inc. and its subsidiary Textron Specialty Vehicles, Inc. will recognize the design flaw and start equipping their vehicles with doors and other proper safety devices to reduce the danger. In the meanwhile, some very bad and defective vehicles are in use and are an extreme hazard for folks who use them.

If you have any questions about a specific Bad Boy accident or need information on the ongoing litigation, contact Greg Allen, our firm’s Senior Product Liability lawyer, at 800-898-2034 or by email at [Greg.Allen@beasleyallen.com](mailto:Greg.Allen@beasleyallen.com). Greg has successfully handled a number of cases involving the Bad Boy Buggy and currently has several active cases pending in court.

### **Industrial Accidents And Workplace Defects**

Each year, thousands of workers are injured or killed at their workplace.

Although a state’s workers’ compensation system places limitations on the ability of employees to hold employers accountable for these work-related injuries, many people do not realize that there may be another available source of recovery. Injuries in the workplace are often caused by defective products, such as a machine where a dangerous nip-point is not properly guarded nor is the employee warned of the dangerous nip-point. If a product causes an on-the-job injury, a product liability suit may be brought against the product’s manufacturer. Catastrophic injuries, deaths, and amputations unfortunately too commonly occur from defective products found in the work place.

Our firm handles numerous product cases each year that arise in the context of an accident that occurred on the job or in the workplace. Currently, Kendall Dunson, a lawyer in the Section, is handling a tragic case that occurred in Tennessee. While working in the maintenance department for his employer, the employee was setting up a roll stack on an extruder. The roll stack is one machine in an entire line. The roll stack consists of three large rollers. The middle roller is the master and the other two are slaves. While working to get the rollers in sync, he was pulled through the rollers and his head was crushed leading to his death. No one saw the incident, but the rollers were found spinning at maximum rate. The rollers have in-running nip points which should have been guarded, but, in this tragic case, the nip-points were not guarded. The manufacturer outfitted the rollers with a stop pull cord along the edges and at the top and bottom of the roll stack. But the roll stack is so large that someone standing in the middle of the roll stack cannot reach the pull cord. The roll stack was defective and unreasonably dangerous for lack of adequate guarding and/or a presence sensing device that would have prevented this needless death.

Kendall Dunson, Ben Locklar and Evan Allen are among our lawyers handling these cases. You can contact them at 800-898-2034 or by email at [Kendall.Dunson@beasleyallen.com](mailto:Kendall.Dunson@beasleyallen.com), [Ben.Locklar@beasleyallen.com](mailto:Ben.Locklar@beasleyallen.com) or [Evan.Allen@beasleyallen.com](mailto:Evan.Allen@beasleyallen.com).

### **Aviation Accidents**

Soaring through the sky at hundreds of miles an hour, thousands of feet above the ground in an airplane or helicopter leaves little room for error. One small mechanical problem, misjudgment or

faulty response in the air can spell disaster for air passengers and even unsuspecting people on the ground. This is why it’s crucial for the aviation industry, including manufacturers, pilots, mechanics and air traffic controllers, to adhere to the highest possible standards at all times.

Statistics indicate mechanical failures cause up to 22 percent of aviation crashes. Historically, aircraft manufacturing defects, flawed aircraft design, inadequate warning systems and inadequate instructions for safe use of the aircraft’s equipment or systems have contributed to numerous aviation crashes. In such cases, the pilot may follow every procedure correctly but still be unable to avert disaster. Mike Andrews, a lawyer in the Section, has handled numerous cases involving defects found in aircrafts.

Currently, Mike is pursuing two defective aviation cases. One case involves a crash of the V22 Osprey in Hawaii resulting in death of a young marine. The Osprey has a long history of defects involving the aircraft’s hydraulics and software. This crash resulted from the engines ingesting sand which was kicked up into the air by the downwash from the Osprey’s rotor-blades as it attempted to land. The aircraft is equipped with a filtration system referred to as an engine air particle separator which is intended to prevent sand and other particle ingestion. However, the system is faulty. Bell and Boeing have tried various iterations and designs but have not yet implemented a safe and effective filter. Several crashes have resulted in deaths and serious injuries.

The other case involves the crash of a light aircraft off the coast of Georgia. Two inexperienced pilots were attending flight school in North Carolina and were assigned to fly an aircraft to Jacksonville, Florida, to the flight school maintenance facility. Unfortunately, the aircraft was dispatched with inoperable equipment. Specifically, the pilots were sent up in an aircraft which had faulty vacuum pumps—one was completely inoperable and the other failed in flight. The vacuum pumps provide the pilots’ horizon and orientation information while in flight. Without such information, pilots lose spatial awareness and become disoriented. Due to the inoperable and faulty equipment, the plane crashed, killing both student pilots.

If you need more information or need help on an aviation-related case, contact Mike Andrews, a lawyer in the Section at

800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

### Non-Auto Product Defects

Lawyers in the Section also handle cases involving defective products, including smoke detectors, flammable clothing, industrial equipment and heaters just to name a few. Most of the time, family members do not suspect that a defective product is the cause of a death or injury, and manufacturers readily blame the victim's actions. We have discovered that defective products are increasingly a major cause of unexpected deaths and injuries. Quite often the real cause of an incident resulting in tragic consequences is a defective product.

### Premises Liability Litigation

Premises Liability Cases can involve claims arising out of falls caused by a foreign substance on the premises, falls caused by a part of the premises, as well as injuries caused by falling items. Specifically, in a case involving a foreign substance on a floor, a Plaintiff must establish that the foreign substance caused the fall and that the Defendant premises owner had notice or should have had notice of the substance at the time of the accident. The law is different when injuries are caused by part of the premises that is in a dangerous condition, such as part of a doorway, curb, or stairs, or where the injury is caused by a display created by a store employee. In situations where the injury is caused by part of the premises or a display that was set up by the store, proof of notice is not a prerequisite, but the Plaintiff must still prove the injury was caused by a defective or dangerous condition. Injuries caused by falling objects most often involve items falling from displays that are either part of the premises, or were set up by the store. If the falling object is the result of a display set up by the store or some part of the premises falling, then the customer does not have to prove notice. Mike Crow, a lawyer in the firm, has extensive experience in handling premises liability cases. If you need any guidance or have any questions, contact Mike at 800-898-2034 or by email at Mike.Crow@beasleyallen.com.

The following lawyers handle Personal Injury & Products Liability Litigation for our firm. Their contact information is below:

- Greg Allen (Greg.Allen@beasleyallen.com)
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Cole Portis heads up the Personal Injury & Products Liability Section. Sloan Downes is the Section Director. They can be reached at 800-898-2034 or by email at Cole.Portis@beasleyallen.com or Sloan.Downes@beasleyallen.com. Dana Taunton and Stephanie Monsplair handle appellate work for the Section and also work on complex cases at the trial court level, doing motion-related work. You can contact Dana and Stephanie at 800-898-2034 or by email at Dana.Taunton@beasleyallen.com or Stephaine.Monsplair@beasleyallen.com. Feel free to contact any of our lawyers at any time.

### **FORD URGES 2,900 PICKUP OWNERS TO STOP DRIVING AFTER NEW TAKATA DEATH**

Ford Motor Co. has confirmed a second death in an older pickup truck caused by a defective Takata airbag inflator. The automaker urged 2,900 owners in North America to stop driving immediately until they can get replacement parts. Ford said it confirmed in late December that a July 2017 crash death in West Virginia in a 2006 Ford Ranger was caused by a defective Takata inflator. It previously reported a similar death in South Carolina that occurred in December 2015.

Ford said both Takata deaths occurred with inflators built on the same day

installed in 2006 Ranger pickups. As we have reported, there are at least 21 deaths worldwide linked to the defective Takata inflators that can rupture and send deadly metal fragments into the driver's body. The faulty inflators have led to the largest automotive recall in history. The other 19 deaths have occurred in Honda Motor Co. vehicles, most of which were in the United States.

Ford issued a new recall for automobiles that had been previously recalled in 2016. Of those 391,000 2004-2006 Ranger vehicles, the new recall announced on Jan. 9 affects 2,900 vehicles. These include 2,700 in the United States and nearly 200 in Canada. The new recall will allow for identification of the 2,900 owners in the highest risk pool.

A Mazda Motor Corp. spokeswoman said on Jan. 11 the company would conduct a similar recall and stop-drive warning for some 2006 Mazda B-series trucks, which were built by Ford and are similar to the Ranger. The National Highway Traffic Safety Administration urged owners to heed Ford's warning. NHTSA spokeswoman Karen Aldana said: "It is extremely important that all high-risk air bags are tracked down and replaced immediately." Ford said it would pay to have vehicles towed to dealerships or send mobile repair teams to owners' homes and provide free loaners if needed.

In June Takata said that it has recalled, or expected to recall, about 125 million vehicles worldwide by 2019, including more than 60 million in the United States. Some 19 automakers worldwide are impacted.

As we have previously stated in prior issues, Takata inflators can explode with excessive force, unleashing metal shrapnel inside cars and trucks, and have injured more than 200. The defect led Takata to file for bankruptcy protection in June. Chinese-owned supplier Key Safety Systems Inc. has purchased Takata's viable assets out of bankruptcy court.

In November, NHTSA rejected a petition from Ford to delay recalling 3 million vehicles with potentially defective airbag inflators to conduct additional testing. In June 2016, NHTSA warned airbag inflators on more than 300,000 unrepaired recalled 2001-2003 model year Honda vehicles showed a substantial risk of rupturing, and urged owners to stop driving them until getting them fixed. NHTSA said they have as high as a 50 percent chance of a rupture in a crash.

Source: *Automotive News*

## X. MASS TORTS UPDATE

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### *MASS TORTS OUTLOOK FOR 2018*

I will give a brief projection in this issue on some of what to expect from our firm in the Mass Torts Section relating to the area of Mass Torts. There have been a number of important developments in recent months that will carry over in 2018. Fortunately, we have lawyers and support staff who are ready and willing to face the challenges ahead.

#### **The Opioid Litigation**

Without a doubt, the opioid litigation will be at the forefront of Mass Torts this year. While many cities and states have already filed lawsuits against opioid manufacturers for the tax dollars spent on treatment and law enforcement measures, our lawyers in the Mass Torts Section are evaluating individual opioid addiction cases involving injuries and deaths caused by overdoses. Opioids are highly-addictive pain killers and were blamed for approximately 64,000 death due to overdose in 2016 alone. Some common opioids include Vicodin, Percocet, Dilaudid, Morphine, Oxycontin, and Oxycodone.

As early as 1911 until the late 1990s, opioids were used in limited circumstances, such as to treat post-surgical pain, end-of-life care or terminal illness. This is because both the medical community and regulators were aware of the addictive nature of these drugs. However, in the late 1990s and early 2000s, treating pain became a greater priority. The pharmaceutical manufacturers played an important role in this changing school of thought, while making billions in the process.

According to the Centers for Disease Control and Prevention, the number of prescription opioids sold to pharmacies, hospitals and doctors' offices almost quadrupled from 1999 to 2014. While there was little evidence of a change in Americans' overall reported pain, prescriptions to opioids skyrocketed. According to U.S. government numbers, there are more than 650,000 opioid prescriptions dispensed every day in this country.

As the number of prescription opioids rose, so too did overdoses and deaths of American citizens. Between 1999 and

2015, over 180,000 Americans died from prescription opioid overdoses.

Now consumers, hospitals, and governments across the country are pushing back with lawsuits and investigations, hoping to hold pharmaceutical manufacturers and distributors accountable for damage caused by the opioid crisis. Currently, opioid lawsuits are being brought by three types of plaintiffs: government entities, hospitals, and injured individuals. While lawyers in Beasley Allen's Toxic Torts Section are investigating and handling claims by government entities, our firm's Mass Torts Section is investigating cases involving individuals who have suffered opioid-related deaths or hospitalization due to overdose.

In December 2017, the Judicial Panel on Multidistrict Litigation centralized opioid lawsuits in the Northern District of Ohio. On January 9, 2018, Judge Dan Polster, the federal judge overseeing this massive multidistrict litigation spoke to a crowded courtroom and expressed the unusual nature of this litigation. Judge Polster explained that his "objective is to do something meaningful to abate this crisis and to do it in 2018." While lawsuits involving government entities may be on a fast track, Judge Polster indicated that injured individuals will still have their right to pursue recovery due to their own unique circumstances.

#### **The Low-T Litigation**

Low testosterone therapy (Low-T) will also be a hot topic this year. On January 8, 2018, the third MDL bellwether trial involving AndroGel began in Illinois federal court. Low-T has been associated with heart attack, stroke, and pulmonary embolisms in men who were using the products for fatigue, depression, and loss of libido. It is very clear that the manufacturers rushed Low-T products to market without adequate safety and efficacy testing. Although the latest Low-T trial resulted in a defense verdict, two other juries have awarded nearly \$300 million in punitive damages to plaintiffs injured by Low-T products. I will have more to say on this litigation below.

#### **The Lipitor Litigation**

Women who were prescribed Lipitor for the primary prevention of a cardiovascular event and later developed Type 2 Diabetes will be watching closely for a decision from the United States Court of Appeals for the Fourth Circuit following the MDL judge's 2017 summary judgment

rulings, and rulings excluding the plaintiffs' experts from testifying on key issues. Oral argument was held in December before a panel of Fourth Circuit judges. The outcome of this case will determine whether plaintiffs in the Lipitor MDL can revive their cases against Pfizer for hiding and downplaying the risks of developing Type 2 Diabetes as a result of taking the drug.

#### **Metal on Metal Hip Litigation**

Our lawyers anticipate several trials involving metal-on-metal hips this year, including hip replacements made by Biomet and DePuy. Metal-on-metal hips were first used more than 40 years ago and the results and outcomes to patients were disastrous because of premature failure and metal toxicity in the human body. In the early 2000s, manufacturers decided to make another go of it, and just as surgeons saw with the early MoM hips, the newer versions often resulted in the same types of injuries to patients. The most recent jury trial against DePuy resulted in a verdict of over \$500 million for the plaintiff. Lawyers in the Mass Torts Section anticipate being the first to take on Biomet at trial later this year.

#### **The Xarelto Litigation**

The Xarelto litigation ended on what appeared to be a high note in 2017 when a Philadelphia state-court jury returned a verdict in favor of the plaintiff for \$28 million after she suffered a gastrointestinal bleed while taking the drug. However, that verdict was set aside last month by the trial judge. Two additional Philadelphia trials will begin very soon with several more to follow later this year. In federal court, Johnson & Johnson is facing almost 20,000 individual Xarelto cases. U.S. District Judge Eldon Fallon of the Louisiana Eastern District oversees that MDL. It is our hope that Judge Fallon will soon begin remanding MDL cases back to their home jurisdictions for trial.

The MDL litigation in the Eastern District of Louisiana now contains approximately 20,000 individual Xarelto cases. Andy Birchfield, the head of Beasley Allen's Mass Torts Section, continues to serve as Co-Lead Plaintiff Counsel for the Xarelto MDL. On January 30, 2018, Judge Fallon was to hear oral arguments regarding the next phase of the Xarelto MDL litigation. The next case management order will control how cases are handled from the date of its issuance going forward, including the possibility that some of the



cases filed in the MDL could undergo additional case-specific discovery and be remanded back to their respective Federal District Courts for trials.

The state court Xarelto litigation in Philadelphia now contains approximately 1,500 cases, and the litigation there continues to be very active. Four additional Philadelphia Xarelto cases are set for trial in March, April, May, and June of 2018. Beasley Allen attorneys continue to work on behalf of thousands of individuals injured by Xarelto.

### **The Talc Litigation**

Finally, in the talc state court litigation, Missouri Judge Rex M. Burlison recently upheld a \$110 million verdict awarded by a St. Louis jury in May of 2017. We believe that 2018 will bring other favorable decisions in several cases currently on appeal. Anticipated decisions include: a decision from the Missouri Supreme Court on the jurisdictional issue following *BMS*, a decision from the NJ Court of Appeals on our appeal of the dismissal of two of our state court cases in September 2016, and a review by appellate courts in California of the JNOV in the *Eccheverria* case, which returned a \$417 million verdict.

Beasley Allen lawyers are also preparing to return to St. Louis for a multi-plaintiff trial in June. In the MDL, generic discovery continues. Plaintiffs recently disclosed expert witnesses and have requested the Court require that Defendants disclose their own witnesses prior to any *Daubert* hearings.

If you have any questions or the need for help on a Mass Torts case, call Melissa Prickett, Mass Torts Section Administrator, at 800-898-2034 and she will put you in touch with the appropriate lawyer. You can email Melissa at [Melissa.Prickett@beasleyallen.com](mailto:Melissa.Prickett@beasleyallen.com).

#### **PENNSYLVANIA SUPERIOR COURT OPENS DOOR FOR PUNITIVE DAMAGES CLAIMS IN THE RISPERDAL MASS TORT LITIGATION**

The Pennsylvania Superior Court has opened the door for Plaintiffs in the Risperdal mass tort to seek punitive damages. We believe this ruling significantly raises the stakes of the litigation, which currently involves more than 6,000 pending cases in Philadelphia. A three-judge Superior Court panel ruled on Jan. 8 that Plaintiffs may seek to have the law of their home state apply to their case when it comes to the issue of whether they

should be allowed to seek punitive damages at trial. The ruling reversed a decision that had applied New Jersey law to the litigation globally. New Jersey products liability law specifically prohibits its punitive damages.

This ruling came as a three-judge panel considered an appeal from Timothy Stange, who took Risperdal beginning 2006 to treat symptoms associated with Tourette's syndrome, after he won \$500,000 in compensatory damages from J&J subsidiary Janssen Pharmaceuticals Inc. in December 2015. The trial judge had not allowed punitive damages to be asked for. The opinion, written by Judge Kate Ford Elliott, stated:

*It is necessary to remand for the trial court to allow Stange to develop an individual record on choice-of-law as it relates to his unique circumstances and to set out the facts and state interests important to his particular case. As such, it is necessary to reverse the order granting partial summary judgment for the defendants on the punitive damages issue.*

The appeal in the Stange case challenged a global order entered as part of a mass tort program in Philadelphia County, which was established to consolidate a large number of Risperdal cases. The lower court's order had found that Janssen's business ties with New Jersey allowed it to take advantage of a state law there shielding pharmaceutical companies from punitive damages for claims related to medications approved by the U.S. Food and Drug Administration (FDA). But lawyers for Stange argued that Wisconsin law should have applied to the case because he was both prescribed the drug and suffered his injury in that state.

Under Wisconsin law punitive damages are capped at the larger of either \$200,000 or twice the amount of any compensatory damage award. Janssen countered that New Jersey law was more appropriate given that its principal place of business was in the state, and the relevant labeling and marketing decisions had been made there. The appeals court, however, found that Philadelphia County, in issuing a global order governing all Risperdal cases, had improperly limited its choice-of-law analysis to either New Jersey law or Pennsylvania law. The Superior Court said that the trial court had not fully addressed the issue.

It remains to be seen, however, whether the trial court, hearing the case

on remand, will decide that Wisconsin has a greater interest than New Jersey when it comes to punitive damages. Tom Kline, a lawyer with Kline & Specter PC representing Stange, discussing the Superior Court's ruling, said:

*This is a pivotal decision in the Risperdal litigation. Each state obviously has a paramount interest in protecting its citizens and the physicians who give warnings to patients and their parents.*

In addition to applying to Risperdal cases moving forward in Philadelphia, the ruling could also have an effect on four other cases where juries have already ruled for Plaintiffs, awarding some \$75 million in compensatory damages. Aside from the punitive damages issue, the Superior Court's decision also rejected Janssen's efforts to challenge the liability verdict in the Stange case. The court found that causation expert Mark Solomon had been properly allowed to testify despite what Janssen argued was his failure to use a generally accepted scientific method to rule out other potential causes for Stange's breast growth.

Stange is represented by Tom Kline, Chip Becker, Christopher Gomez and Ruxandra Laidacker of Kline & Specter PC and Stephen Sheller of Sheller PC. The case is *Timothy Stange v. Janssen Pharmaceuticals Inc. et al.*, (case numbers 739 EDA 2016 and 1549 EDA 2016), before the Pennsylvania Superior Court.

Source: Law360.com

## **XI. PREMISES LIABILITY UPDATE**

#### **CHICAGO PAYS \$115 MILLION TO WOMAN PARALYZED AT THE O'HARE AIRPORT**

The City of Chicago has paid \$115 million in settlement to a woman who was paralyzed from the waist down by a falling pedestrian shelter at O'Hare International Airport. This settlement ends the city's challenge to a jury's award of \$148 million to the woman. The city and its insurance carrier will pay Plaintiff Tierney Darden the \$115 million rather than continuing to challenge the damages verdict handed down by a Cook County

jury in August. Lead Plaintiffs counsel Patrick A. Salvi said in a statement:

*I believe anyone who sat through the trial would not find the award to be excessive. Although we believed the verdict would have been upheld on appeal, when weighing the risks and benefits, we felt this was a fair compromise. Darden has a long, difficult life ahead of her; these funds will help her obtain all the necessary medical care for the remaining decades of her life.*

Ms. Darden, 24, was waiting to be picked up from O'Hare with her mother and sister on an August 2015 afternoon when a storm gust loosened a pedestrian shelter that weighed more than 750 pounds. The shelter came loose and fell on Darden, severing her spinal cord. Ms. Darden was a dancer and student at Truman College when she was paralyzed. The lawsuit, which named both the City of Chicago and the City of Chicago Department of Aviation as Defendants, involved claims for negligence and willful and wanton conduct.

It was determined the shelter that caused the incident had missing bolts. However, a subsequent investigation at O'Hare found other shelters also had missing bolts, as well as corroded parts or broken brackets. In early 2017, the City of Chicago admitted wrongdoing in the accident, and in August, the case was tried before a jury on damages. On Aug. 23, following a 10-day trial, the jury awarded \$148 million to Ms. Darden, which appears to have been the largest personal injury verdict on record in the state of Illinois.

Following the trial, the City of Chicago filed post-trial motions arguing that the verdict was excessive. However, after an "extensive mediation," Ms. Darden's lawyers and the city's insurance carrier agreed to the \$115 million settlement. Ms. Darden is represented by Patrick A. Salvi, Jeffrey J. Kroll, Tara R. Devine, Patrick A. Salvi II, and Eirene N. Salvi of Salvi Schostok & Pritchard. The case is *Tierney Darden v. City of Chicago et al.*, (case number 2015 L 008311), in the Circuit Court of the Cook County, Illinois.

Source: Law360.com

#### **FAMILY SUES ALASKA AIRLINES FOR ESCALATOR FALL THAT LED TO A WOMAN'S DEATH**

The Spokane family of a 75-year-old woman who uses a wheelchair is suing Alaska Airlines and its contractor Huntleigh USA. The family claims that airline workers' failure to care for the woman resulted in her fall down an escalator at Portland International Airport. She died three months later from her injuries. It's alleged in the suit that Bernice Kekona's family had requested a gate-to-gate escort service during her trip from Maui to Spokane in June 2017. The suit alleges further that Kekona's family called Alaska Airlines three times to make sure she would not be left alone during her trip. Federal law requires airlines to assist disabled passengers on and off their flights and between gates to make connections.

Ms. Kekona, who had impaired vision and hearing, also had a prosthetic left leg and used a power wheelchair for mobility. The lawsuit contends the woman was helped off her Alaska flight from Maui to Portland, but that workers from Huntleigh USA left her alone in the terminal to find her next gate. Ms. Kekona is seen on Portland airport surveillance video wandering through the airport and moving her wheelchair to the top of an escalator. The lawsuit alleges that the woman, who suffered extensive injuries in the fall, told first responders she was confused and thought she was boarding an "elevator" before she fell down 22 escalator steps face-first with her heavy electric wheelchair on top of her.

An Alaska Airlines spokesperson, Bobbie Egan, released a statement denying fault. She said that "Ms. Kekona declined ongoing assistance in the terminal and decided to proceed on her own to her connecting flight." The airlines contend that the family failed to fill out necessary application documents correctly.

The lawsuit claims, however, that the airline had a responsibility to escort Kekona to her connecting flight in Portland, no matter what she may have told a worker, or what boxes on forms they may not have checked. It appears there were several places in the reservation form asking if there were any special needs for the passenger. The case is scheduled for trial in December of this year.

Source: www.springfieldnewssun.com

#### **\$3.5 MILLION JURY VERDICT IN BED BUG INFESTATION CASE**

The largest "bed bug" jury verdict in the United States was returned in California recently. In the case against Park La Brea, one of the largest apartment complexes in California, a jury returned a verdict of \$3.5 million last month for 16 renters whose units were infested with the pests.

Brian Virag, who represented the renters, operates his own firm, "My Bed Bug Lawyer." He exclusively handles bed bug cases. The Park La Brea litigation included a period between 2011 and 2013. However, it appears that the apartment complex owners became aware of the bed bug problem in 2008.

The apartment complex had an on-site pest control operator, which made recommendations on how to deal with the problem, including such things as educating tenants about the issue and employing specially trained dogs to sniff out the bugs. But Virag said the complex went with its own methods like chemical treatments, which didn't solve the problem. He said it was that oversight that perhaps struck a chord with the jurors. The lawyer stated:

*I would think that what the jury was not particularly pleased with was that Park La Brea had the resources to deal with this early on and to try to deal with it in a more effective way and they didn't.*

The complex initially tried to settle the case but made a low-ball offer. Once the trial began, Park La Brea increased its offer, but it wasn't enough to settle the cases. Virag stated:

*It's really a traumatizing experience to go through bed bugs, because you're living with it. It affects every portion of your life, from being able to sleep to being able to go to work. You go to work with bites all over your body. It's humiliating; there's a lot of shame involved.*

This was a tremendous result in a case that should get the attention of not only this Defendant, but also other companies that rent apartment complexes and other rental units. There really should be no excuse for having bed bug problems in rentals. This verdict confirms that belief.

Source: Law.com

## **MOVIE STUNTMAN'S FAMILY FILES WRONGFUL DEATH SUIT IN GEORGIA**

The mother of a stuntman who fell to his death on the set of "The Walking Dead" in Georgia has filed a wrongful death lawsuit against the show's network and other Defendants. It's contended in the lawsuit, that unreasonably low budgets led to inadequate safety precautions. John Bernecker, 33, died on July 12 from injuries suffered in a fall on the set in Senoia.

The lawsuit filed last month by Susan Bernecker in Gwinnett County State Court says AMC Networks Inc. "orchestrated and enforced a pattern of filming and producing 'The Walking Dead' cheaply and, ultimately, unsafely." It's further alleged that AMC pressured production company Stalwart Films to keep budgets and expenses unreasonably low, leading Stalwart Films to cut corners on safety measures. The lawsuit also names other companies associated with AMC and Stalwart Films, as well as the director and stunt coordinator for the episode that was being shot. An actor who was shooting a scene with Bernecker is also a Defendant.

Susan Bernecker said in a press release that she hopes her son's death will lead to improved safety standards for stunt performers in the film and television industries. She stated:

*My goal is to do everything I can to protect other stunt performers and to ensure their safety on the set in the future. The industry is not doing enough to maintain basic safety guidelines for these performers. Worst of all, they're scared to speak up.*

In early January, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) cited Stalwart Films in Bernecker's fatal fall. The agency proposed a fine of \$12,675, the maximum allowable fine for a single serious violation, for "failure to provide adequate protection from fall hazards." OSHA said the company could have used several methods to reduce the risk from stunts on high platforms. In a statement after the citation was issued, Stalwart Films said it disagreed with the citation and called Bernecker's fall "a tragic and terrible accident," saying it meets or exceeds industry safety standards on its sets.

Reportedly, Matthew Goodwin, an assistant director who is named as a Defendant in the lawsuit, told a respond-

ing officer that Bernecker was supposed to fall about 22 feet (7 meters) from a balcony over a railing onto "a pad made of a layer of 22-inch boxes, port-a-pit pads, and a large pad." This comes from a report by the Coweta County Sheriff's Office. Austin Amelio, who is also named as a Defendant in the lawsuit, was the only actor on the balcony with Bernecker at the time of the fall. The report says he told the same officer that he had asked Bernecker if he had ever done a fall like that before. Reportedly, the stuntman said he had done a few, but never from that high up. Amelio told the officer that Bernecker "seemed a little nervous."

Filming began after Bernecker gave a thumbs-up to signal he was ready, Goodwin said. Bernecker got most of the way over the railing and then appeared to try to stop the fall by grabbing the railing with both hands, but he hit the balcony, causing him to release his grip and spin upside down as he fell, the report said. Bernecker landed a few inches from the pad.

The lawsuit asks for a jury trial and seeks punitive and compensatory damages, as well as attorney fees. Susan Bernecker is represented by Jeff Harris, who had represented the parents of another film worker, Sarah Jones, who was killed on a Georgia railroad trestle in 2014 during the shooting of a movie about singer Gregg Allman. In that case, CSX Transportation was ordered to pay \$3.9 million in damages to Jones' parents. CSX lawyers blamed filmmakers who were denied permission by CSX to shoot on its tracks. Film director Randall Miller served a year in jail for the death of Ms. Jones.

Source: Associated Press

## **TEXAS TOWN SETTLES SUIT OVER CHEMICAL EXPLOSION FOR \$10.4 MILLION**

The city of West, Texas, has reached a \$10.4 million settlement with the manufacturers and suppliers of ammonium nitrate that the city blamed for contributing to the deadly fertilizer explosion in 2013 that rocked the small town. The city said the settlement includes \$6.4 million from CF Industries, \$3.9 million from El Dorado Chemical, and \$143,000 from Adair Grain. The city had alleged they were negligent in supplying agricultural-grade ammonium nitrate to West Fertilizer and not properly warning about the risks of handling and storing it, contributing to the devastating blast that killed 15

people in the town. The settlement came just before trial was scheduled to begin on Jan. 16.

While settlements with individuals related to the explosion have been confidential, the city of West said in a press release that it is required by law to disclose the information when requested. The City of West is represented by Steve Harrison, Zona Jones, Bryan Harrison and Matt Morrison of Harrison Davis Steakley Morrison Jones PC, and Mark Grotefeld and Pat Gareis of Grotefeld Hoffman. The case is *City of West, Texas v. CF Industries Sales LLC et al.*, (number 2013-2476), in the District Court of McLennan County, Texas.

Source: Law360.com

## **XII. WORKPLACE HAZARDS**

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### **TRENDS IN WORKPLACE SAFETY**

Unfortunately, millions of American workers are injured and thousands more lose their lives every year in job-related incidents. It is important to document these incidents to understand why they occur and to take steps to improve workplace safety. The Bureau of Labor Statistics (BLS) is the source for information regarding reportable workplace injuries and fatalities. In November of 2017, the BLS released the latest (2016) statistics on nonfatal workplace injuries. Just over a month later, fatal work injury statistics were released for public review. The raw data provided in the releases provides an insight into whether the laws and systems in place to protect workers are serving their purposes.

According to the BLS, there were 2.9 million nonfatal workplace injuries and illnesses reported for 2016. The figures are slightly down from 2015 statistics. Reportable nonfatal workplace injuries are broken down into those resulting in time missed from work (the more serious injuries) and those that do not require time off from work (minor injuries). A third of all nonfatal injuries in 2016 were attributable to serious injuries requiring days away from work. Interestingly enough, in manufacturing, injuries and illnesses to production workers accounted for 64 percent of the total days away from work incidents. It should be

noted that production workers in manufacturing are likely working with or around industrial machinery. BLS reported 5,190 fatal workplace injuries in 2016. Statistics from prior years indicate three consecutive years of increases in annual workplace fatalities and 2016 is the first year since 2008 that on the job deaths exceeded 5,000. Fatalities involving contact with objects or equipment along with deaths associated with harmful environments both increased.

When a worker dies in an on-the-job injury the loss extends beyond the workplace to the family that lost a loved one and a provider. Likewise, serious nonfatal injuries either require significant time from work, and in some instances, reduce the injured employee's earning capacity. For non-fatal injuries, the worker's income and ability to earn income will be negatively affected temporarily.

Some injuries are severe enough to negatively affect a worker's earnings for their entire work life expectancy. Because many of the deaths and serious nonfatal injuries are caused by interactions with some form of industrial machinery, it is important for manufacturers to ensure that robots and other machines are designed with adequate safety devices in place.

In turn, the employer has a responsibility to properly train employees and ensure that the manufacturer-provided safety devices are installed and properly maintained. Safer industrial machines will result in a reduction of deaths and the nonfatal injuries requiring days off work.

It should be no surprise that the current administration took steps to reduce the Occupational Safety and Health Administration's (OSHA) ability to enforce workplace safety requirements. OSHA's purpose is to emphasize worker safety and many of the rules apply specifically to safeguarding industrial machinery. Without OSHA's constant oversight, manufacturers and employers might be tempted to sacrifice worker safety for profits, which will lead to more deaths and serious injuries.

We will continue to monitor these statistics and use them to inform our readers about workplace safety. If you need more information, contact Kendall Dunson, a lawyer in our Personal Injury & Products Liability Section, who handles workplace litigation for our firm. He can be reached at 800-898-2034 or by email at Kendall.Dunson@beasleyallen.com.

## WORKPLACE HAZARDS—MACHINE GUARDING

In 1970 Congress established the Occupational Safety and Health Act and an accompanying Administration with the mission to assure safe and healthy working conditions for the American people. Under Section 5(a)(1) of the Act, employers are required to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees." This provision of the Act is typically referred to as the general duty clause, and goes on to require that employers comply with the standards promulgated under the entirety of the Act.

The Occupational Safety and Health Administration (OSHA) has without question made the U.S. workforce safer in the 40-plus years since its inception. However, injuries due to workplace hazards are still some of the most common cases we see in our practice. Often these injuries are caused by hazards created by the premises where one is working, such as trip-and-fall accidents or falls from ladders or stairs. However, the most serious on-the-job injuries we see typically involve hazards caused by defective machinery, equipment or tools on the job site.

Industrial machines, often due to the very nature of the machines, create hazards that cannot be completely eliminated. To completely do away with these functions would eliminate the hazard, but also the utility of the machine. In such cases, guards are often the best means to retain both the function of the machine and protect the employee against the hazard. The OSHA Act specifically speaks to the necessity to guard against hazards caused by machinery. Section 1910.212, often referred to as the general guarding provision, requires "one or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks."

Hazards generally occur in three locations: the point of operation, or the location where the machine cuts, bends, or presses a material; a power take-off or power transmission device; or any other moving parts such as gears or chains. For employees that work around machinery, it is imperative that these hazardous areas are adequately guarded. There are many different types of guards that are com-

monly used to protect the user from the hazards associated with these locations. Fixed barrier guards, interlocking devices, light curtains, and sensors are all common methods to protect the user from hazards.

Other forms of guarding include two-hand tripping devices, or other means by which to keep the operators' hands away from the moving parts. An appropriate guarding method largely depends on the type of hazard. Effecting machine design requires that the engineer perform a hazard risk analysis. In the analysis, the engineer must identify all hazards and undertake to either eliminate the hazard through design or guarding.

The most effective guards are those that do not hinder the function or utility of the machine while safely eliminating the hazard posed to the user. OSHA further requires that the guard be fastened to the machine, difficult to remove, and not create additional or different hazards.

Even if the manufacturer takes appropriate steps to design and implement guards on machinery, the guards must remain in place and in good working order to be effective. In Alabama, if an employer removes a safety device incorporated by the designers of the machine, the injured may sue their employer outside of workers' compensation. Under Ala. Code § 25-5-11(c)(2), an injured employee may bring an action in tort if a safety device is intentionally removed from a machine. These cases are very common and are easily overlooked unless a detailed investigation is conducted.

All too often machines are unguarded, inadequately guarded, or the wrong type of guard is used. In many instances productivity and ease of use is given more weight in machine design than user safety. Failure to adequately guard against hazards can cause any number of injuries including amputations, lacerations, and even death. Every on-the-job injury involving a machine must be examined on a case-by-case basis. Just because guards are incorporated into a particular machine does not necessarily mean that the user or operator was adequately protected. OSHA regulations are a great starting point in building a machine guarding case.

If you need more information on this subject, contact Evan Allen, another of our lawyers in our Personal Injury & Products Liability Section, who handles premises liability claims, at 800-898-2034

or by email at [Evan.Allen@beasley-allen.com](mailto:Evan.Allen@beasley-allen.com).

### **SEXUAL HARASSMENT IN THE WORKPLACE**

In recent months, there has been a huge surge of sexual harassment accusations levied against a number of powerful men in our society. These accusations have rocked many industries including sports, entertainment, and more recently the legal field. The accusations were soon followed by a rallying cry, and the #MeToo movement was started. This #MeToo movement is a way that men and women across the country can both express their solidarity with victims and publicly announce that they too have been victims of sexual harassment. The momentum of the #MeToo movement is causing a major shift in the way society views victims of workplace sexual harassment.

In 1964, Congress passed Title VII of the Civil Rights Act of 1964. Title VII is a federal law that prohibits workplace discrimination based on sex, race, color, national origin, and religion and is aimed at employers with 15 or more employees. Sexual harassment has been determined to be a form of sexual discrimination that clearly violates the federal law. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as “unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature... when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment.” 29 CFR § 1604.11.

There are two types of sexual harassment: *quid pro quo* and hostile work environment. Let’s first explore *quid pro quo* sexual harassment. The Latin phrase “*quid pro quo*” means an exchange of something for something. In an employer/employee context, *quid pro quo* sexual harassment takes place when a superior (i.e. supervisor, manager, or other person of power) makes sexual favors a condition of one’s employment. This type of sexual harassment usually comes with promises of job benefits or threats of retribution if the victim does not comply with the superior’s overtures.

Other examples of *quid pro quo* harassment are positive or negative work assignments, promotions or demotion,

and positive or negative performance reviews either in exchange for sexual favors or as punishment for refusing to comply with a superior’s demand for sexual favors. The 11<sup>th</sup> Circuit has held that for an employee to be successful in advancing a *quid pro quo* sexual harassment theory, the Plaintiff must prove the following elements:

- the employee belongs to a protected group;
- the employee was subject to unwelcome sexual harassment;
- the harassment complained of was based upon sex; and
- the employee’s reaction to harassment complained of affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment.

Additionally, a corporate Defendant will be held strictly liable for a superior’s action under the *quid pro quo* harassment theory.

The second type of workplace sexual harassment theory is hostile work environment. Hostile work environment sexual harassment occurs when an employer alters an employee’s job conditions because of the employee’s refusal to submit to sexual demands. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. at 65, 106 S. Ct. at 2405 (1986). A hostile work environment due to sexual harassment often manifests itself through severe and pervasive explicit jokes, constant demands for sexual favors, racy or crude comments, or even by sharing inappropriate text messages or images. These utterances and/or demands are often so severe that it becomes difficult for an employee to comfortably go about his/her work. For a Plaintiff to be successful in advancing a hostile work environment theory the Plaintiff must prove the following:

- The employee belongs to a protected group;
- The behavior was severe or pervasive;
- The harassment complained of was unwelcomed; and that
- The employer knew or should have known about the harassment but failed to take prompt, corrective action.

Historically, sexual harassment claims have been difficult cases to win. In times past, the victim’s credibility has been put on trial instead of the perpetrator’s

wrongful actions. Because of this reality, many victims are reluctant to report the offensive behavior. As more victims of sexual harassment come forward, we are seeing a shift in society’s perspective on this issue.

If you think you have been a victim of workplace sexual harassment, it is important to seek the immediate advice of an employment lawyer. You can contact Larry Golston or Leon Hampton, lawyers in our firm’s Consumer Fraud & Commercial Litigation Section, at 800-898-2034 or by email at [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com) or [Leon.Hampton@beasley-allen.com](mailto:Leon.Hampton@beasley-allen.com).

### **FAMILIES TO RECEIVE \$6 MILLION IN SETTLEMENT OF RAILROAD TANK CAR DEATHS**

The families of two central Illinois men who died in 2014 after breathing gas inside a railroad tanker car will receive \$6 million from the settlement of a lawsuit. A federal investigation determined 37-year-old Frank Rosebur and 29-year-old Dean Stone were victims of safety rule violations at Agridyne LLC’s livestock food plant in Pekin. The lawsuit had been filed in Tazewell County Circuit Court.

The air-tight tanker contained hydrogen sulfide gas, which can kill with only a few breaths, when Rosebur entered to clean it of corn. Steep residues remained when the car had been drained. The worker passed out in seconds. Stone entered the car after Rosebur’s work partner called for help. Stone was climbing up the hatch latter with Rosebur on his shoulder when he passed out and collapsed.

The Occupational Safety and Health Administration (OSHA) cited Agridyne with safety violations and imposed a \$266,000 fine. The families will split the settlement proceeds. Matthew Ports, a lawyer with Pflag, Gill & Ports, represented both families in the lawsuit.

Source: *Associated Press*

## **XIII. TRANSPORTATION**

### **AMTRAK CRASH INCREASES PRESSURE TO BOLSTER RAIL SAFETY TECHNOLOGY**

We wrote in January about the Amtrak train derailment in Washington that

killed three people during the inaugural trip on a new route. That accident has reignited concerns over federal rail safety mandates that have yet to be fully implemented. The pressure should be increasing on railroads to install crash-avoidance technology. The National Transportation Safety Board (NTSB) said in a Jan. 4 preliminary report that the Dec. 18 derailment of an Amtrak Cascades train was due to it speeding as it approached a curve, and that federally mandated technology known as positive train control (PTC) that can automatically activate brakes on trains in over-speed situations could have prevented the accident if the technology had been fully activated on that stretch of track.

The Washington wreck, according to safety experts, has amplified the pressure on railroads and train operators to accelerate the widespread rollout of positive train control before a year-end deadline. As we reported previously, Congress mandated that passenger and freight railroads install PTC by the end of 2015 when it passed the Rail Safety Improvement Act in 2008. However, the railroads have successfully delayed installing the rail safety technology. They successfully lobbied Congress to extend that deadline to Dec. 31, 2018, in the Fixing America's Surface Transportation (FAST) Act of 2015.

In certain situations, railroads can ask the Department of Transportation (DOT) to bump their PTC installation deadlines to 2020. But with the nation's sprawling network of rail tracks and railroad operators, the responsibility for PTC implementation is often shared among multiple parties. The debate is ongoing at present over who all was responsible for the Washington accident.

This latest Amtrak derailment, a September 2016 NJ Transit commuter train crash in Hoboken, New Jersey, and the May 2015 derailment of Amtrak 188 in Philadelphia have brought the PTC issue back to the fore and have sparked outrage that the slow rollout of the technology has cost lives, experts say. Whenever there is a major Class I freight rail accident, the NTSB has to determine if the accident could have been prevented by PTC.

Following the Amtrak incident, U.S. Transportation Secretary Elaine Chao sent letters to railroads on Dec. 27 urging them to take all possible measures to ensure they will meet the year-end deadline to install PTC. Reps. Peter DeFazio, D-Ore., ranking member of the House

Committee on Transportation and Infrastructure, and Michael Capuano, D-Mass., ranking member of the House Subcommittee on Railroads, Pipelines and Hazardous Materials, have demanded that the DOT hold railroads more accountable for complying with the deadline.

The legislators have introduced a bill, Positive Train Control Implementation and Financing Act, that would speed up PTC implementation by requiring that all railroads have the technology installed by the end of the year, while also preventing railroads from getting further extensions on the deadline, and providing approximately \$2.5 billion in grants for cash-strapped commuter and intercity passenger railroads to implement PTC. Rep. DeFazio said in a statement last month: "Enough. No more delays, no more extensions, no more excuses from railroads who have had 10 years to implement PTC technology."

PTC is a multifaceted system that involves digital radio communications, a global positioning system and fixed wayside signal systems to transmit a continuous stream of data about the location, direction and speed of trains, according to regulators. Ultimately, PTC can be used to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a main line switch in the wrong position.

The Federal Railroad Administration (FRA) website tracks railroads' progress in installing PTC. Only a few regional railroad operators have reached the 100 percent mark for equipping locomotives, completing track segments, installing radio towers, training employees, acquiring spectrum, installing back office servers, and submitting safety plans for the FRA's review and approval.

Meanwhile, the lawsuits are being filed against Amtrak over the Washington derailment. PTC is front and center in those suits. The Plaintiffs allege that Amtrak equipped the locomotive with a control system that would have warned its operator to slow down and automatically brake if he didn't respond, but "knowingly failed" to make it operable.

There is a \$295 million statutory cap on damages that Amtrak can face from any single incident. Congress first set the damages cap at \$200 million in the Amtrak Reform and Accountability Act of 1997, but raised that cap to \$295 million in the 2015 FAST Act, making sure that it also applied retroactively to the May 2015 Amtrak crash in Philadelphia. The FAST

Act also adjusted the cap for inflation every fifth year going forward.

Source: Law360.com

## XIV. HEALTHCARE ISSUES

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### ***ROMAINE LETTUCE LINKED TO OUTBREAK OF E. COLI IN 13 STATES***

*Consumer Reports* said last month that people should stay away from romaine lettuce until U.S. and Canadian health officials get to the bottom of an outbreak of *E. coli* infections. The consumer advocacy group called on the Food and Drug Administration (FDA) and Centers for Disease Control and Prevention (CDC) to do more to warn people about the outbreak, which at last count had made 58 people sick in the U.S. and Canada. Reportedly, one person has died.

Canadian officials first identified an *E. coli* outbreak on Dec. 11 and linked it to romaine lettuce three days later, advising Canadians to avoid eating romaine. In contrast, the CDC waited until Dec. 28 to notify the public about the *E. coli* outbreak, which it said in a news release had started around Nov. 15. The CDC said 17 people were sick in 13 states, dating back to November. In its statement, the CDC said:

In the United States, state and local public health officials are interviewing sick people to determine what they ate in the week before their illness started. CDC is still collecting information to determine whether there is a food item in common among sick people, including leafy greens and romaine. Because we have not identified a source of the infections, CDC is unable to recommend whether U.S. residents should avoid a particular food.

On Jan. 8, U.S. Rep. Rosa DeLauro (D-Connecticut) harshly criticized the CDC for what she called its "stunning lack of guidance" and "slow and insufficient response" to the deadly *E. coli* outbreak. Rep. DeLauro, who often champions food safety issues, sent her harsh rebuke to CDC director Dr. Brenda Fitzgerald. In the letter, Rep. DeLauro suggests the CDC's delay could have cost U.S. consumers their life. She writes:

CDC's stunning lack of guidance to consumers regarding this outbreak is unconscionable. Just as concerning, the investigation appears to have gone 'cold,' with the agency's own staff seemingly content with ending the investigation without ever finding the cause and source.

Rep. DeLauro's letter includes a list of questions about the outbreak. Among the questions she asks are, "What is the CDC's justification for waiting almost a month and a half before publicly confirming the outbreak?" and "To what degree has the CDC collaborated with the Public Health Agency of Canada" in investigating the outbreak.

Thorough cooking usually kills foodborne bacteria such as *E. coli* or salmonella, but lettuce is not usually cooked. "Even though we can't say with 100 percent certainty that romaine lettuce is the cause of the *E. coli* outbreak in the U.S., a greater degree of caution is appropriate given that romaine lettuce is almost always consumed raw," said James Roger, food safety director at Consumer Reports.

Consumers Union's Jean Halloran said people should get stronger warnings. She stated:

*The FDA should follow the lead of the Canadian government and immediately warn the public about this risk. The available data strongly suggest that romaine lettuce is the source of the U.S. outbreak. If so, and people aren't warned, more may get sick.*

It can take weeks to track down the source of a food poisoning outbreak. Food is often shipped to central plants from various farms, where it is processed, mixed together, packaged, and redistributed.

Consumer Reports said people should err on the side of caution and throw out romaine lettuce. It stated:

*Neither the U.S. nor Canadian health officials have provided information on where the romaine lettuce potentially involved in the illnesses was grown or processed, so for now, Consumer Reports says consumers should assume that any romaine lettuce, even when sold in bags and packages, could possibly be contaminated. Do not buy romaine lettuce and don't use any that you may have in your refrigerator until there is more informa-*

*tion on the source of contamination. Consumers should also check salad blends and mixes, and avoid those that contain romaine.*

*E. coli* bacteria are just about everywhere, and they are normally harmless residents of the digestive tract. But there are a few forms that can cause diseases. The CDC estimates that about one in six Americans are made sick by foodborne illnesses every year—that's about 48 million people. About 3,000 die. The toxin produced by *E. coli* 0157 can cause severe stomach cramps, bloody diarrhea and vomiting. The most dangerous effect is hemolytic uremic syndrome (HUS), a type of kidney failure. The CDC said:

*Very young children and the elderly are more likely to develop severe illness and HUS than others, but even healthy older children and young adults can become seriously ill.*

Sources: Today, RightingInjustice.com, Sen. Rosa L. DeLauro, CDC

## XV. ENVIRONMENTAL CONCERNS

### MAJOR ENVIRONMENTAL LITIGATION FOR 2018

We will take a brief look in this issue at some of the major environmental litigation that our firm will be involved in during 2018. Lawyers in our Toxic Torts Section, headed by Rhon Jones, handle this litigation.

#### Opioids Update

Nearly 200 local governments, and several states, have filed lawsuits against prescription opioid manufacturers and distributors in an effort to curb the ongoing opioid epidemic. Recently, our firm filed lawsuits on behalf of Houston County and the City of Greenville and we are currently representing over 25 other local governments.

For now, all of the cases appear to be civil lawsuits seeking monetary damages to help the governments recoup the money lost to fighting the epidemic. Many of the lawsuits also hope to force drugmakers to change their marketing tactics, which they argue are deceptive,

to make it clearer just how addictive the pills can be.

There are many other Cities and Counties in Alabama that have been disproportionately impacted by prescription opioid abuse that not have not yet filed suit. Alabama has one of the highest rate of prescription opioid use in the country with more prescriptions being written than people living in the state.

We expect that many more states and local governments around the country will file lawsuits against opioid manufacturers and distributors in the coming months. If you need additional information relating to this litigation, contact Rhon Jones, head of our Toxic Torts Section, at 800-898-2034 or rhon.jones@beasleyallen.com. Rhon, Rick Stratton and Will Sutton are handling this litigation for the firm."

#### Off-Shore Drilling

The Trump administration has recently unveiled its proposal to permit drilling in most U.S. continental-shelf waters, including currently protected areas of the Arctic and Atlantic, and has also proposed opening nearly 77 million more acres in the Gulf of Mexico to companies wishing to purchase federal oil and gas leases. The Bureau of Ocean Energy Management, which oversees offshore leasing, has promised that the marine environment will be protected as the United States pursues an energy dominance agenda.

Needless to say, this controversial proposal has been opposed by many outside the oil and gas industry. Offshore drilling led to the worst environmental disaster in U.S. history, the 2010 Deepwater Horizon explosion and subsequent oil spill in the Gulf of Mexico. The effects of that spill are still being felt almost eight years later, and many are worried that the increased risks of additional drilling outweigh the potential rewards.

#### PFC Water Contamination

As previous issues of the Report discussed, the contamination of drinking water from perfluorinated chemicals (PFCs) is a nationwide problem. Testing found traces of two of the most well-studied PFCs, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), in 162 water systems serving 15.1 million Americans.

A recent report from Eurofins Eaton Analytical laboratories suggests that our nation's drinking water may be more con-

taminated than originally thought. The lab, which has conducted testing for the EPA, found that up to 28 percent of water systems nationwide serving more than 10,000 customers contain some levels of the perfluorochemicals PFOA and PFOS. This is significantly higher than the 4 percent originally reported by the EPA in 2016 and means that millions more Americans could unknowingly be exposed to some levels of PFOA and PFOS.

PFOA and PFOS persist in the environment for years and accumulate in the body. Exposure over one's lifetime can lead to a number of health problems including testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol and pregnancy-induced hypertension. Consequently, the EPA set a lifetime health advisory of exposure to PFOA and PFOS at 70 parts per trillion in May 2016.

These unregulated chemicals were tested by the EPA between 2013 and 2015 as part of the Third Unregulated Contaminant Monitoring Rule. According to Eaton, the EPA set the "minimum reporting level" (the lowest amount of a chemical the EPA said could reliably be detected) too high, which resulted in underreporting the number of contaminated water systems. Rather than selecting 20 ppt for PFOA and 40 ppt for PFOS, Eaton states the chemicals can be detected as low as 2.5 ppt.

Eaton reanalyzed the EPA's data and, after dropping the MRL to 5 ppt, found at least one of six PFCs in samples from 511 water systems, or 28 percent of those tested serving approximately 13.8 million people. PFOA was discovered in 12.5 percent of the systems while PFOS was found in 11.5 percent, compared to less than 1 percent reported by the EPA. According to Eaton's data, five states had more than 40 systems detect either PFOA or PFOS: Alabama, California, Massachusetts, New Jersey and South Carolina.

More testing is needed to fully understand the extent of chemical contamination of our nation's water. As the results of ongoing testing are revealed, we expect lawsuits filed by water systems and residents to increase in the upcoming year.

Our firm, along with Roger H. Bedford of Roger Bedford & Associates, has filed lawsuits on behalf of the water systems in Gadsden and Centre, Alabama. These complaints allege that carpet and textile companies, manufacturers, and chemical suppliers located upstream in Dalton, Georgia are responsible for contaminat-

ing the Coosa River and Weiss Lake. The lawsuits were filed to ensure that these entities, not ratepayers in Gadsden and Centre, would pay to decontaminate their drinking water.

Lawyers at Beasley Allen are investigating other PFC contamination cases. If you have any questions about this subject, contact Rhon Jones, Rick Stratton, or Ryan Kral, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com, Rick.Stratton@beasleyallen.com, or Ryan.Kral@beasleyallen.com.

### **PFC National Litigation Update**

Water systems nationwide are filing lawsuits against alleged polluters to recoup costs incurred to deliver clean water to their customers. Individuals are also suing these companies for contaminating private wells and causing personal injuries. These lawsuits help illustrate the widespread use of PFCs across a variety of industries.

As discussed above, the carpet industry relies heavily on PFCs and related chemicals to manufacture carpet that is stain-resistant. Many companies in the textile industry use PFCs or related chemicals to apply stain or water-resistant qualities to their products. For example, Michigan's Department of Environmental Quality recently sued a leather tannery for contaminating the drinking water of nearby residents. Manufacturers of these chemicals have also been sued in Decatur, Alabama and in North Carolina.

In addition, PFCs are present in some firefighting foams used to fight petroleum fires. Therefore, fire departments, the military, and airports have been identified as potential sources of contamination in Colorado, North Carolina, New Hampshire, Pennsylvania, Washington, and Massachusetts. These entities appear to be the most common polluters of contaminated water systems identified by the EPA in 2016.

Although we are in the infancy of this litigation, settlements have been reached with Daikin America in Decatur, Alabama and with the County of Barnstable, Massachusetts. The military is also involved in ongoing discussions with residents who live on or nearby military bases across the country. While these signs are encouraging, we expect more lawsuits to be filed to hold polluters accountable for contaminating Americans' drinking water.

### **Dicamba**

In 2017 there was an increase in lawsuits filed by farmers against Monsanto, BASF, and DuPont regarding the herbicide dicamba. The complaints generally allege that dicamba tends to "drift" and cause damage to non-dicamba-resistant neighboring crops during and after its application to a target crop.

Prior to the 2017 growing season, farmers were not allowed to use dicamba on growing plants. They could use it before planting their seeds or after harvesting their crops. In 2016, that changed when the EPA allowed new formulations of dicamba to be applied over the top of growing plants due to the manufacturer's claims that the new formulations were less volatile.

Unsurprisingly, farmers in more than two dozen states reported problems in 2017. The problems were so severe and widespread that in July 2017 Missouri and Arkansas introduced short-term bans on the herbicide. In response, the EPA toughened its dicamba regulations for 2018.

Many farmers have already filed lawsuits against Monsanto, BASF, and DuPont alleging that they have suffered crop damage or losses because of dicamba's off-target movement. These filings are expected to increase well into 2018.

### **The E-cigarette Litigation**

More than 120 lawsuits were filed across the United States in 2017 by Plaintiffs hurt in explosions and fires involving e-cigarette devices. Most Plaintiffs have alleged they were burned around their legs or groin when vaporizer batteries they were carrying in their pocket caught fire. A few Plaintiffs have alleged that electronic cigarettes have exploded in their mouth, knocking out teeth and causing facial burns. However, the first wrongful death lawsuit was recently filed in California.

Most lawsuits involving e-cigarette injuries will be products liability claims, alleging one of three causes for the malfunction:

- Defects in Design: A defect causes the e-cigarette to pose an unreasonable risk to consumers, even if it is manufactured and used as intended;
- Defects in Manufacturing: A mistake in the production of a well-designed e-cigarette introduces a new danger to consumers; or



- **Defects in Warnings:** A company's failure to properly warn consumers of known risks in using e-cigarettes, if there are inadequate warnings, inaccurate warnings, or no warnings at all.

So far, the e-cigarette litigation has not shown any signs of slowing down in 2018. In fact, the U.S. Fire Administration's statistics indicate that e-cigarette fire incidents have been steadily increasing, coinciding with rapid growth of vaping products into a popular alternative to smoking tobacco.

E-cigarettes have turned into a multibillion-dollar industry, and according to a 2016 National Health Interview Survey, roughly 15 percent of adults reported that they had used vaping products at some point.

If you have any questions regarding the litigation, or if you would like for us to review a potential claim, contact Rhon Jones or Will Sutton, lawyers in our firm's Toxic Torts Section, at 800-898-2034 or by email at Rhon.Jones@beasleyallen.com or Will.Sutton@beasleyallen.com.

### Mesothelioma Update

Beasley Allen lawyers continue to handle mesothelioma cases in our region and throughout the country. These are devastating for families who have a loved one diagnosed with mesothelioma, as the cancer is terminal and is caused by exposure to asbestos. We have helped numerous families navigate this difficult path. Rhon Jones is the lead lawyer in these cases for our firm and he can be reached at rhon.jones@beasleyallen.com."

### Roundup Litigation Update

Lawyers at Beasley Allen are actively investigating cases on behalf of farmers, landscapers, or others who used commercial-grade Roundup on a large scale and subsequently developed non-Hodgkins Lymphoma (NHL). The active ingredient in Roundup is a broad system herbicide and crop desiccant called glyphosate. Roundup is manufactured by Monsanto, and is the company's flagship product—glyphosate is the most widely used weed killer in the world.

In July 2015, the International Agency for Research on Cancer (IARC) issued a report determining that glyphosate is "probably carcinogenic to humans," and specifically linked Roundup exposure to the development of NHL. Monsanto claims that the IARC is wrong and that Roundup is harmless to humans, yet

internal company emails released in the last year show that Monsanto may have influenced supposedly "independent" studies that concluded Roundup was safe.

Hundreds of lawsuits are currently pending against Monsanto Co. in U.S. District Court in San Francisco, filed by plaintiffs alleging that their exposure to Roundup caused them or their loved ones to develop NHL and that Monsanto covered up the risks of using their product. These cases have been consolidated into a multidistrict litigation, and Daubert hearings are currently scheduled for the week of March 5, 2018. There are also several thousand similar claims filed against Monsanto in state court.

If you would like more information, you can contact Grant Cofer, a lawyer in Toxic Torts Section. He can be reached at 800-898-2034 or by email at Grant.Cofer@beasleyallen.com.

### Benzene Litigation Update

Benzene is a carcinogenic liquid that is widely used throughout the United States. Benzene is among the top 20 chemicals produced by volume each year and is used in a number of industries and products, yet many people remain unaware of the toxic danger posed by this chemical. Some industries in which benzene is commonly used include the manufacture of plastics, resins, lubricants, rubbers, solvents, and degreasers. Exposure to products containing benzene can cause life threatening diseases, including Acute Myeloid Leukemia (AML), Myelodysplastic Syndrome (MDS), Aplastic Anemia, and other types lymphomas and blood illnesses. Occupations in which workers may be exposed to benzene include:

- Tire and rubber workers
- Mechanics
- Painters
- Gasoline workers
- Railroad and seamen
- Printers

The seriousness of the poisoning caused by benzene depends on the amount, route, and length of time of exposure, with chronic long-term exposure carrying the most risk. Because the diseases caused by benzene exposure do not manifest for several years after exposure to the chemical, many individuals may not recognize that there is any con-

nection between their disease and their past chemical exposure.

Beasley Allen is currently pursuing cases on behalf of clients who developed one of these types of leukemias or lymphomas following exposure to benzene-containing products. If a person has been diagnosed with one of these diseases and has a history of chronic benzene exposure, we are interested in investigating whether they have a potential claim.

If you would like more information, you can contact John Tomlinson, a lawyer in Toxic Torts Section. He can be reached at 800-898-2034 or by email at John.Tomlinson@beasleyallen.com.

If you have any questions about any of the above, contact Sandra Walters, the Toxic Torts Section Director, at 800-898-2034 or by email at Sandra.Walters@beasleyallen.com. Sandra will put you in touch with a lawyer.

### OREGON SUES MONSANTO OVER \$100 MILLION PCB POLLUTION CLEANUP

The State of Oregon has filed suit against Monsanto Co. over pollution caused by polychlorinated biphenyl (PCB). The suit was filed in an Oregon state court seeking more than \$100 million to cover damages and cleanup costs stemming from the toxic chemical, known as PCB. Oregon joined a slate of cities and states, including its own Portland and neighboring Washington state, that have sued Monsanto and linked companies for manufacturing the durable chemical for decades—even after learning that it was toxic to humans and animals and could contaminate the environment.

Oregon is still trying to remedy the damage to its natural resources and environment caused by PCBs, which are lingering in the state's lands, waterways and wildlife even though the chemicals have been banned since the late 1970s. The complaint said:

*Today, Oregon bears the burden of Monsanto's decision to place profit above all else. The toxic legacy that Monsanto left Oregonians lives on, as PCBs persist in Oregon's lands, rivers, and waterways, in its sediments, soils, and in the bodies of animals and humans. It has caused harm to aquatic, marine, and avian species, and poses ongoing risks to the health of the people of the state of Oregon.*

Monsanto was the only company in the United States to manufacture PCB for widespread commercial use between 1929 and 1977, distributing the fire-resistant chemical nationwide for use in all sorts of products, including electrical equipment, paint and caulking. Even though Monsanto's internal research shows the company knew as early as 1937 that PCBs were toxic to humans and animals and could contaminate the environment, the company continued to sell the chemicals until they were banned under federal law.

Oregon alleges as the public began to grow concerned about the chemical in the 1960s, the company went so far as to assemble an internal team tasked with concealing PCB's harmful effects and deflecting criticism, "deciding instead that its financial bottom line—and, later, its corporate reputation—were more important than the health and well-being of humans and the environment." As a result, Oregon says Monsanto caused hundreds of millions of pounds of PCBs to enter the environment over the years, and the chemicals continue to contaminate public lands and waterways such as the Portland Harbor, as well as fish and wildlife.

As we have previously reported, exposure to the chemicals is dangerous to both animals, for whom it is known to cause cancer, and to humans, for whom it has been deemed a known carcinogen. In addition for humans other problems such as liver damage, skin conditions, nose and lung irritation, and learning impairment are caused by PCBs. Oregon state alleges the chemicals are hard to get rid of and bioaccumulate in fish and wildlife, which means that species further along the food chain accumulate PCBs from eating smaller species.

Oregon is seeking to hold Monsanto responsible for the financial burden the state has and will continue to incur as it tries to clean up and remediate contaminated sites. The state's claims include public nuisance, trespass and unjust enrichment. The suit also names Eastman Chemical Co. subsidiary Solutia Inc., which was a spinoff of original Monsanto's chemical products business, and Pfizer Inc. unit Pharmacia Inc., which now operates the old company's pharmaceutical business.

Oregon Attorney General Ellen Rosenblum said in a statement that the state is paying a big price for Monsanto's actions, as PCBs continue to be dredged up in river sediments and found in the tissues

of fish and wildlife. The Attorney General said:

*PCBs are extremely hard to get rid of—and it will take significant time and resources to fully clean them up. It only makes sense that the manufacturer of these PCBs, Monsanto, help clean up this mess with dollars!*

As to be expected, Monsanto denies liability and in a statement issued last month, said:

*Cleanup efforts are underway in Oregon with the full group of responsible parties under supervision of the EPA, and it's most important that everyone stay focused on that work. This lawsuit is baseless and undermines the ongoing EPA cleanup efforts, and Monsanto will defend itself accordingly.*

The suit is *State of Oregon v. Monsanto Co. et al.*, in the Circuit Court of the State of Oregon for the County of Multnomah.

Source: Law360.com

## XVI. UPDATE ON NURSING HOME LITIGATION

### **NURSING HOME CARE SUFFERS AS OWNERS FUNNEL PROFITS INTO RELATED COMPANIES**

In what has become an increasingly common business arrangement, owners of some nursing homes outsource a wide variety of goods and services to companies in which they have a financial interest or that they control. Nearly three-quarters of nursing homes in the United States—more than 11,000—have such business dealings, known as related party transactions, according to an analysis of nursing home financial records by Kaiser Health News, a nonprofit news service committed to in-depth coverage of health care policy and politics.

In these related party transactions, owners can establish highly favorable contracts in which their nursing homes pay more for basic services than they might in a competitive market. Owners then siphon off higher profits, which are

not recorded on the nursing home's accounts. Some homes even contract out basic functions like management, or rent their own building from a sister corporation, saying it is simply an efficient way of running their business and can help them minimize taxes.

But a Kaiser Health News analysis of federal inspection and quality records reveals that nursing homes that outsource to related organizations tend to have significant shortcomings: They have fewer nurses and aids per patient, they have higher rates of patient injuries and unsafe practices, and they are the subject of complaints almost twice as often as independent homes. In fact, Kaiser's analysis revealed that these nursing home companies, on average, employed 8 percent fewer nurses and aids, were 9 percent more likely to hurt residents or put them in immediate jeopardy of harm, were fined 22 percent more often for serious health violations, and received 24 percent more substantiated complaints from their residents than were independent nursing homes.

"Almost every single one of these chains is doing the same thing," says Charlene Harrington, a professor emerita of the School of Nursing at the University of California-San Francisco. "They're just pulling money away from staffing." Ms. Harrington's statement was substantiated by the allegations in a Tennessee lawsuit. In that lawsuit, nurses and aids testified about how their nursing home corporation would add staffing for state inspections while the rest of the time their pleas for more staffing to care for residents went unheeded.

These corporate webs and related party transactions bring the nursing home owners a legal benefit in addition to financial benefits: When a nursing home is sued, injured residents and their families have a much harder time collecting money from the related companies—the ones with the full coffers. This seems to be an industry-wide strategy. In 2003, an article appearing in the *Journal of Health Law* encouraged owners to separate their nursing home businesses into detached entities to protect themselves if the government tried to recoup overpayments or if juries levied large negligence judgments against the nursing home. Further, at a 2012 conference for executives in the long-term health care industry, one presentation boasted that such complex corporate structure was advantageous because in lawsuits brought on behalf of residents harmed by the nursing

home's negligence discovery of the true corporate structure will be "too expensive and time consuming," and "financial statements in punitive damages phase shows less income and assets."

Despite the nursing home industry's efforts to avoid accountability and protect their profits at all costs, lawyers at Beasley Allen continue to fight for residents and their families who have been harmed by a nursing home's abuse, negligence or poor care. If you or your loved one has suffered serious injury or death because of nursing home abuse or neglect, or if you have any questions about nursing home abuse and neglect, contact Chris Boutwell at [Chris.Boutwell@beasleyallen.com](mailto:Chris.Boutwell@beasleyallen.com) or by phone at 800-898-2034. Chris handles nursing home litigation for our firm and he will be happy to talk with you. Chris also has written a helpful brochure about identifying signs of nursing home abuse and neglect, and steps you can take to file a claim. You can request a copy of the brochure at [www.beasleyallen.com/books](http://www.beasleyallen.com/books).

Source: Kaiser Health News

## XVII. AN UPDATE ON CLASS ACTION LITIGATION

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### ***INTEL'S 'MELTDOWN' SECURITY DEFECT SPARKS LITIGATION***

Lawyers at Beasley Allen, along with several other law firms, represent a proposed class of Plaintiffs in a federal lawsuit filed against Intel Corporation. The suit comes after the corporation admitted to a security flaw in the design of the central processing units (CPUs) used in personal computers, which leaves every personal computer using an Intel CPU vulnerable to hackers. The security vulnerability caused by Intel's CPUs affects potentially millions of consumers and all computers using the processors manufactured since at least 2004. The computer industry refers to this major security flaw or vulnerability as the "Meltdown."

On Jan. 4, 2018, Plaintiffs Richard Reis and Zachary Finer filed a complaint in the United States District Court for the Northern District of California on behalf of all consumers who have purchased Intel CPUs. Richard Reis and Zachary Finer are

represented by Beasley Allen lawyers Dee Miles, who is head of the firm's Consumer Fraud & Commercial Litigation Section of the firm, and Leslie Pescia, a lawyer in the Section.

Intel manufactures some of the fastest CPUs in the world, which are used in the most popular personal computers, including cellphones, sold on the market. The complaint filed by Beasley Allen alleges Intel touted the speed of its CPUs in advertising and on the packaging for the processors. However, to manufacture faster CPUs, Intel took shortcuts that led to the Meltdown security flaw in the defectively designed CPUs. The Meltdown flaw allows hackers unauthorized access to sensitive and private information contained on the memories of personal computers, including usernames, passwords and other personal information. The complaint alleges the security flaw in Intel's CPUs puts potentially millions of people at risk of fraud, having their identities stolen, and having malware installed on their personal computers.

Jann Horn, a security analyst for the Google-run security research group named Google Project Zero, discovered the security defect in Intel's CPUs in June 2017. Despite knowing about the security flaw in June 2017, Intel continued to market and to sell CPUs containing the security flaw. The Meltdown security defect was not publicly announced until early January 2018. At the same time, Intel announced that it was working to develop a "patch"—which is a software update—to secure personal computers against the Meltdown.

However, the patch will drastically slow the performance of the CPUs, because correcting the security flaw caused by Intel's shortcuts in designing the CPUs is essentially correcting the exact feature that made the CPUs fast in the first place. These patches are estimated to slow computers with Intel processors down by as much as 30 percent, resulting in Intel CPUs no longer being the fastest on the market.

The complaint filed by Beasley Allen lawyers alleges various causes of action against Intel based on its deceptively marketed CPUs containing the design defect. These causes of action include breach of warranty, unjust enrichment, and various state's deceptive trade practices acts and consumer protection statutes. The complaint alleges consumers with personal computers containing Intel's CPUs are being deprived the benefit of the CPUs

for which they bargained and are left without any choice but to accept the patch to safeguard their personal information—which comes at the expense of the fast performance Intel marketed. Further, the complaint alleges that consumers would not have purchased Intel's CPUs or would have paid substantially less for the CPUs if Intel would have made them aware of the security flaw and the necessity of a patch.

If you would like to speak with a lawyer regarding Intel's "Meltdown" security flaw defect and deceptive marketing, contact Dee Miles at 800-898-2034 or by email at [Dee.Miles@beasleyallen.com](mailto:Dee.Miles@beasleyallen.com) or Leslie Pescia at [Leslie.Pescia@beasleyallen.com](mailto:Leslie.Pescia@beasleyallen.com).

Sources: Law360 and *Reis v. Intel Corp.*, No. 5:18-cv-00074-SVK (N.D. Cal. Jan. 4, 2018).

### ***PETROBRAS TO PAY NEARLY \$3 BILLION TO SETTLE SECURITIES CLASS ACTION***

Brazilian oil giant Petrobras has agreed to a tentative settlement to pay \$2.95 billion to resolve an investor class action over a corruption scandal that sent the prices of its securities falling. The company refused the U.S. Supreme Court to delay its decision on whether to hear the case. Jeremy Lieberman, one of the lawyers for the Plaintiffs, said the settlement would address the investors' claims against both Petrobras and the banks that underwrote its securities that were named in the consolidated lawsuit. The settlement must be approved by U.S. District Judge Jed Rakoff.

Petrobras told investors the amount would be paid in two installments of \$983 million 10 days after the court grants preliminary and final approval of the settlement and a final payment of \$984 million by Jan. 15, 2019, or six months after final approval, whichever comes later. If the settlement is approved, it would end a closely watched lawsuit that raised key questions about the limits of securities class actions.

Judge Rakoff's original decision to certify two classes of investors was partly reversed by the Second Circuit last year because it was unclear whether trades by class members were "domestic" by the standards set in the Supreme Court's 2010 Morrison ruling.

Lieberman said the settlement to be filed would define class membership in a way supported by case law. While he said it wasn't clear how many investors could ultimately benefit from the deal, Lieber-

man said the Plaintiffs had sought about \$15 billion in damages, a number he called “highly aggressive.” The settlement comes more than a year after Petrobras said it was setting aside \$353 million to fund settlements with four investment firms that were among the biggest holders of its securities.

The case is *Petroleo Brasileiro SA - Petrobras et al. v. Universities Superannuation Scheme Ltd.*, (case number 17-664) in the U.S. Supreme Court.

Source: Law360.com

### **\$2.3 BILLION INVESTORS' SETTLEMENT APPROVAL SOUGHT**

Investors have asked a New York federal court to give final approval to settlements amounting to slightly more than \$2.3 billion in settlements resolving putative class claims that Bank of America Corp., Barclays Bank PLC, Citigroup Inc. and others rigged foreign exchange rates. The global banking giants faced claims they were part of a scheme to manipulate foreign exchange markets over an approximately six-year period.

As a result, settlements totaling \$2,310,275,000 were reached with 15 of the 16 Defendant financial institutions. This is the third largest antitrust class action settlement ever achieved, according to the Plaintiffs' filing. “Although government regulators and prosecutors have imposed fines and reached settlements with certain banks for FX-related misconduct, the 15 settlements here are the only ones that will return money to the victims of the misconduct,” the motion for approval says. Class members have responded positively to the settlements, according to the investors. The motion says:

*As of January 12, 2018, no class member has objected to the settlements, and of the potential hundreds of thousands of class members only six entities with minimal trading volumes have requested exclusion.*

The Defendants and their individual settlement amounts are: Bank of America, \$187.5 million; Bank of Tokyo-Mitsubishi UFJ Ltd., \$10.5 million; Barclays, \$384 million; BNP Paribas SA, \$115 million; Citigroup, \$402 million; Deutsche Bank AG, \$190 million; Goldman Sachs Group Inc., \$135 million; HSBC Holdings PLC, \$285 million; JPMorgan Chase & Co., \$104.5 million; Morgan Stanley, \$50

million; RBC Capital Markets LLC, \$15.5 million; The Royal Bank of Scotland PLC, \$255 million; Societe Generale, \$18 million; Standard Chartered PLC \$17.2 million; and UBS AG, \$141,075,000.

The 15 settlements were negotiated separately, with Credit Suisse AG remaining the sole holdout among the banks included in the sprawling multidistrict litigation. In their motion for approval of attorneys' fees, the investors say that although early settlements provided momentum and helped focus discovery efforts in the case, the work to prove a conspiracy among all of the Defendants was challenging. And although there were parallel government investigations, only some of the Defendants' foreign exchange-related conduct was targeted. The lawyers are asking for \$381 million in fees.

On behalf of all Plaintiffs' counsel, the lead counsel asked the court to award 16.51 percent of the settlement fund—\$381,353,830.27—plus interest as attorneys' fees, and also moved for the reimbursement of \$22,495,669.73 in litigation expenses. The 16.51 percent cut sought for the class counsel is comparable to what's been deemed fair and reasonable by other courts in “mega-fund” cases, according to the fee motion.

The action, filed in 2013 amid regulatory investigations, accused major financial institutions of engaging in a scheme to rig the \$6 trillion foreign exchange market from at least 2007 to 2013. In 2016, a first round of settlements was given preliminary approval by U.S. District Judge Lorna D. Schofield. In September 2017, she gave the court's initial blessing to others, including, most recently, Deutsche Bank's \$190 million deal. The JPMorgan Settlement, announced in January 2015, “was an icebreaker, motivating other Defendants to enter into negotiation,” according to the motion for final approval.

The cooperation from JPMorgan, and later UBS, helped to substantiate the conspiracy, which included collusion on pushing through trades just before or during the time when benchmarks are set, according to the investors, along with using chatrooms and other mechanisms to set rates.

Co-lead class counsel are Christopher M. Burke, Walter W. Noss, Kristen M. Anderson, Stephanie A. Hackett, David R. Scott, Joseph P. Guglielmo, Donald A. Broggi, Peter A. Barile III, Sylvia Sokol and Thomas K. Boardman of Scott & Scott Attorneys at Law LLP, and Michael

D. Hausfeld, Bonny E. Sweeney, Reena A. Gambhir, Timothy S. Kearns, Nathaniel C. Giddings, Sarah R. LaFreniere, Michael P. Lehman, and Christopher L. Lebsack of Hausfeld LLP.

The case is *In re: Foreign Exchange Benchmark Rates Antitrust Litigation*, (case number 1:13-cv-07789), in the U.S. District Court for the Southern District of New York.

Source: Law360.com

### **PERSHING AND VALEANT AGREE TO A \$290 MILLION SETTLEMENT ENDING ALLERGAN SUITS**

Hedge fund Pershing Square and Valeant Pharmaceuticals have reached a \$290 million preliminary agreement to settle two investor suits pending in a California federal court. The companies were accused of an insider trading scheme in connection with Valeant's attempted \$55 billion takeover of Allergan. The settlement, which was announced on Dec. 29, must be approved by the court.

If approved, the settlement could rank among the largest shareholder class action settlements in 2017. It would require Pershing Square Capital Management LP to pay \$193.75 million, which is roughly two-thirds of the total settlement. Valeant Pharmaceuticals International Inc. would be responsible for paying the remaining \$96.25 million. The settlement resolves claims brought by a certified class of Allergan Inc. common stock sellers and a proposed class of traders in derivatives linked to Allergan stock. Pursuant to the settlement, the common stock class would receive \$250 million and the derivative class would receive \$40 million.

The settlement came as U.S. District Judge David O. Carter was preparing to issue a final ruling on summary judgment motions filed in the case brought by the common stock sellers. That case was scheduled to go to trial late this month.

Some of the claims involved in the settlement date back as far as December 2014 and arise from investor allegations of a scheme in which Valeant supposedly tipped off Pershing Square in February 2014 about its impending hostile takeover of Allergan so that Pershing could buy stock in Allergan and commit that stake in support of Valeant's takeover bid. Investors have said Pershing Square then “covertly” acquired a massive 10 percent stake and gleaned billions in profits by selling on the news of the takeover bid. Third-party bidder Actavis wound up

making a tender offer of \$219 per share that beat Valeant's \$200 per share bid.

The cases are *In re: Allergan Inc. Proxy Violation Derivatives Litigation*, (case number 2:17-cv-04776), and *In re: Allergan Inc. Proxy Violation Securities Litigation*, (case number 8:14-cv-02004), both in the U.S. District Court for the Central District of California.

Source: Law360.com

#### **DRYWALL MAKERS TO PAY \$125 MILLION TO SETTLE PRICE-FIXING CLAIMS**

Three drywall manufacturers have agreed to pay a class of direct purchasers \$125 million to settle price-fixing claims pending in multidistrict litigation (MDL) being overseen by a Pennsylvania federal court. These settlements agreements bring the total settlement amount for the class up to \$190.7 million. The settlement will end the direct purchasers' portion of the litigation.

National Gypsum, Eagle Materials Inc. and PABCO Building Products were the last of seven Defendants in multidistrict litigation that began in 2013. Previous settlements with three other companies—Lafarge North America Inc., TIN Inc. (or Temple-Inland) and USG Corp.—bring the total amount of settlements for direct purchasers in the case to nearly \$191 million. In 2016, U.S. District Judge Michael Baylson of the Eastern District of Pennsylvania granted summary judgment as to a seventh Defendant, CertainTeed Corp.

The latest settlements were made with affiliates of American Gypsum Co., National Gypsum Co. and PABCO Building Products LLC. The prior agreements were reached with three other manufacturers, including Lafarge North America Inc. Kit A. Pierson, a partner with Cohen Milstein who served as co-lead counsel in the case, said in a statement:

*We are pleased with this settlement for our class of 14,000 plaintiff entities and believe it sends a strong message to the rest of the industry. When companies violate the anti-trust laws and drive up prices for their customers, they will be held accountable.*

The suits, which were consolidated in 2013, accuse the drywall manufacturers of conspiring to hike prices starting in 2011, while the companies have argued they were just following the lead of American Gypsum, which was the first to

raise its prices. The buyers also allege the companies made agreements to change their price quoting practices around the same time, conspiring to no longer provide so called job quotes, which used to lock prices in for the duration of a specific project regardless of market fluctuations.

In August of last year Judge Baylson certified a class of direct purchasers, which includes distributors, buying cooperatives and contractors, that purchased paper-backed gypsum wallboard directly from the Defendants anytime in 2012 or 2013. However one day later, the judge rejected a certification request from a group of indirect buyers that said they purchased the products from third parties such as The Home Depot Inc. or Lowe's Companies Inc. between 2012 and the present. Judge Baylson found the indirect purchasers failed to provide a feasible way of determining class membership, and knocked the group's proposal for a class period that extends to the present.

The direct purchasers are represented by H. Laddie Montague Jr., Eric L. Cramer, Ruthanne Gordon, Michael C. Dell'Angelo and Candice Enders of Berger & Montague PC; Kit A. Pierson and David A. Young of Cohen Milstein Sellers & Toll PLLC; and Eugene A. Spector, Jeffrey J. Corrigan, Rachel E. Kopp and Jeffrey L. Spector of Spector Roseman Kodroff & Willis PC. The case is *In Re: Domestic Drywall Antitrust Litigation*, (case number 2:13-md-02437), in the U.S. District Court for the Eastern District of Pennsylvania.

Source: Law360.com

#### **AIRLINES TO PAY \$29.4 MILLION TO SETTLE PRICE-FIXING CLASS ACTION**

Three airlines accused of fixing the price of long-haul flights to Pacific destinations have agreed to pay a total of \$29.4 million to settle a proposed class action. The Plaintiffs moved for preliminary approval in the Northern District of California of the settlement agreements with Philippine Airlines Inc., Air New Zealand Ltd. and China Airlines Ltd. The settlements will leave just two carriers in the suit—All Nippon Airways Co. Ltd. and EVA Airways Corp.—which have asked the U.S. Supreme Court to review whether the filed-rate doctrine should let them escape the suit.

China Airlines agreed to the largest settlement: \$19.5 million in cash plus

\$250,000 for notice costs. Philippine Airlines would pay \$9 million, and Air New Zealand would pay \$400,000 plus \$250,000 toward notice costs.

The litigation dates back to 2007, when passengers accused a group of airlines of conspiring to fix prices on long-haul trans-Pacific flights to Australia, New Zealand and the Pacific Islands. Most of the carriers have already settled the case. Air France, Japan Airlines International Co., Vietnam Airlines Co., Thai Airways International Public Co. Ltd., Malaysian Airline System Bhd. and Cathay Pacific Airways Ltd. agreed to deals totaling \$29.6 million in 2014.

A few months later, there were two more settlements with Singapore Airlines Ltd. and Qantas Airways worth \$9.2 million and \$550,000, respectively. The court ultimately approved those settlements over the objections of one class member who challenged the settlements and lost at the Ninth Circuit. The Supreme Court refused in December to review the case despite claims the settlements were marred by intraclass conflicts. The other five carriers had sought summary judgment, saying that the suit was barred by the filed-rate doctrine because the U.S. Department of Transportation (DOT) oversees the airlines' fares and surcharges.

The district court denied, however, and the Ninth Circuit upheld that ruling in a split decision. The panel found that the doctrine, which bars suits over federal agency-approved rates, did not shield the airlines. The district judge correctly ruled that it was a question of fact as to whether the DOT was regulating fares and surcharges that the airlines did not directly file with the agency, and that a material dispute of fact must thus be settled via trial. The Ninth Circuit panel agreed. The two remaining Defendants, Eva and All Nippon, asked the Supreme Court in October to review the issue.

The Plaintiffs are represented by Adam J. Zapala and Elizabeth Castillo of Cotchett Pitre & McCarthy LLP, and Michael D. Hausfeld, Seth R. Gassman, Michael Lehmann and Christopher Lebsock of Hausfeld LLP. The case is *In re: Transpacific Passenger Air Transportation Antitrust Litigation*, (case number 3:08-md-01913) in the U.S. District Court for the Northern District of California.

Source: Law360.com

## **TOYODA TO PAY PURCHASERS \$34 MILLION IN AUTO PARTS ANTI-TRUST MDL**

A putative class of direct buyers who sued Toyota Gosei Co. Ltd. over alleged price-fixing of occupant safety systems have asked a Michigan federal judge to approve a \$34 million settlement with the manufacturer. This is the latest settlement to emerge from a massive multidistrict litigation (MDL) against auto industry companies. In 2012, the direct purchasers had accused Toyota—and other companies such as TRW Automotive Holdings Corp. and Autoliv Inc.—of conspiring with other auto parts manufacturers to suppress and eliminate competition for occupant safety systems through price-fixing and bid-rigging.

The case is part of a huge MDL that followed the U.S. Department of Justice's own expansive investigation into the auto parts industry, which has already yielded more than \$1 billion in fines. The MDL has been split into separate proceedings for different automotive parts, including those filed by automotive dealerships for automotive wire harnesses, switches, steering angle sensors and HID ballasts.

The latest settlement comes in a proceeding focused on occupant safety systems. Seeking recovery of triple the damages they suffered by paying more for the systems than they would have paid sans an illegal conspiracy, the direct purchasers have reached multiple settlements with the companies involved in the MDL. In June 2014, Autoliv paid \$65 million to exit the litigation. In September 2014, the class of car buyers scored a \$5.4 million deal with TRW.

Toyota became the next domino to fall in November, agreeing to the proposed \$34 million settlement. The settlement does not release Toyota Gosei from claims based on indirect purchases of occupant safety systems or claims based on negligence, personal injury or product defects. In a footnote, the direct purchasers said the settlement amount is subject to reduction, but will be no less than \$14.25 million based upon the level of requests for exclusion by class members.

The group comprises all individuals and entities who purchased occupant safety systems in the U.S. directly from companies involved in the alleged conspiracy between January 2003 and February 2015.

The direct purchaser Plaintiffs are represented by David H. Fink of Fink & Associates Law; Gregory P. Hansel of Preti Flaherty Beliveau & Pachios LLP; Joseph

C. Kohn of Kohn Swift & Graf PC; Steven A. Kanner of Freed Kanner London & Millen LLC; and Eugene A. Spector of Spector Roseman Kodroff & Willis PC. The MDL is *In re: Automotive Parts Anti-trust Litigation*, (case number 2:12-md-02311) in the U.S. District Court for the Eastern District of Michigan. The case is *In re: Occupant Safety Systems—Direct Purchaser Actions*, (case number 2:12-cv-00601), in the same court.

Source: Law360.com

## **COMSCORE INVESTORS AGREE TO \$110 MILLION SETTLEMENT OVER INFLATED STOCKS**

Investors in ComScore Inc., a media analytics company, have asked a New York federal judge to approve a \$110 million settlement over alleged intentional miscalculations the company's accounting department made that caused artificial stock value inflation and led to heavy losses. According to the proposed settlement, ComScore will pay the class \$27 million in cash, as well as stocks valued at \$82.7 million. Claims brought by potentially thousands of shareholders who saw their share prices fall more than 33 percent after the company announced it needed to recalculate three years of incorrect financial statements will be settled.

The settlement was said to be a considerable achievement given the financial condition of ComScore and the potential ability to pay issues presented in this case. The securities class action was initially filed in March 2016, after ComScore disclosed that its audit committee had been contacted about "potential accounting matters" and would therefore be launching an investigation.

In its amended complaint, the class alleged ComScore executives knew that its accountants had been misreporting revenues, but lied to investors and media companies about the trajectory of the company. When the March 2016 auditing announcement came, the class said stock prices—which had nearly doubled in less than two years based on the inflated revenue reports—came falling down.

The investors will drop their claims that ComScore violated sections 10(b) and 20(a) of the Securities Exchange Act in return for \$110 million, pending a review of internal ComScore documents and interviews of ComScore witnesses. Lead Plaintiffs also have the right to withdraw from the proposed settlement after the due diligence discovery practice if

they discover that the proposed settlement isn't quite adequate.

There are two related actions in Oregon state court that claimed ComScore's 2016 merger with Rentrak Corp. included breaches of fiduciary duty that have already been settled for \$19 million. The settlement in those Oregon cases covered claims against Rentrak Defendants who allegedly ignored warning signs to merge with ComScore, and because of a high degree of crossover between the Oregon classes and the New York case, class counsel said the parties agreed to dismiss claims against the Rentrak Defendants in the New York settlement.

The class comprises all those who bought or otherwise acquired ComScore stock from February 2014 through November 2016; all those who held stock in Rentrak as of December 2015 and were entitled to vote on the merger; and those who acquired ComScore stock based on the company's Oct. 30, 2015, registration statement and were subsequently damaged.

The class will likely include thousands, based on the fact that comScore had nearly 40 million outstanding shares of common stock during the class period, with an average daily trading volume on the NASDAQ of more than 400,000 shares per week.

The class is represented by John C. Browne of Bernstein Litowitz Berger & Grossmann LLP and Sharan Nirmul and Margaret E. Mazzeo of Kessler Topaz Meltzer & Check LLP. The case is *Sommer v. ComScore Inc., et al.*, (number 1:16-cv-01820) in the U.S. District Court for Southern New York.

Source: Law360.com

## **XVIII. THE CONSUMER CORNER**

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### **AVOIDING WINTER FIRE HAZARDS**

When most people think of winter storms, they think of relaxing snow days filled with soup and snowball fights. While trying to keep warm, the last thing on anyone's mind is that their source of heat could be fatal. However, heating is the second leading cause of U.S. home fires, deaths and injuries. December, January and February are the peak

months for heating fires. In 2011–2015, U.S. fire departments responded to 54,030 home structure fires that involved heating equipment.

These fires caused 480 civilian fire deaths, 1,470 civilian fire injuries, and \$1.1 billion in direct property damage. Space heaters are the type of equipment most often involved in home heating equipment fires, figuring in two of every five fires (40 percent). The leading factor contributing to ignition for home heating fire deaths (53 percent) was heating equipment too close to flammable items, such as upholstered furniture, clothing, mattress or bedding.

To avoid heating source fires, the National Fire Protection Agency (NFPA) recommends keeping anything that can burn at least three feet away from any heat source like fireplaces, wood stoves, radiators or space heaters. Plug only one heat-producing appliance (such as a space heater) into an electrical outlet at a time. Have a qualified professional clean and inspect your chimney and vents every year. Store cooled ashes in a tightly covered metal container, and keep it outside at least 10 feet from your home and any nearby buildings.

Another winter fire hazard is carbon monoxide (CO), an odorless, colorless gas created when fuels such as gasoline, wood, coal, propane, etc. do not burn

completely. In the home, heating and cooking equipment that burn fuel are potential sources of CO. Portable generators, while useful during power outages, present a risk of carbon monoxide poisoning. According to a 2013 Consumer Product Safety Commission report, half of the generator-related deaths happened in the four coldest months of the year, November through February, and portable generators were involved in the majority of carbon monoxide deaths involving engine-driven tools. Keep portable generators outside, away from windows, and as far away as possible from your home. The NFPA recommends installing and testing carbon monoxide alarms at least once a month.

Source: NFPA.org

### CLAIM FILING AND OPT OUT DATE FOR OCWEN TCPA SETTLEMENT APPROACHES

The date for consumers to opt out of or file a claim in a Class Action Settlement between Ocwen, a mortgage servicing firm, and homeowners is rapidly approaching. The date set for potential class members to file a claim or opt out of the Settlement and file an individual claim is set for March 5, 2018.

Even though the settlement is anticipated to pay out less than \$100 per claimant, it does provide for future injunctive relief. By filing a claim, if Ocwen continues to make automated calls to a consumer's cellular telephone, Ocwen has agreed to pay between \$1,000 and \$1,500 per phone calls. By contrast, if an individual can prove a violation of the Telephone Consumer Protection Act (TCPA), that person could be entitled to \$500 to \$1,500 per phone call received in violation of that statute.

The class definition covers certain consumers who were contacted by Ocwen between Oct. 27, 2010 and Oct. 6, 2017. If you believe you are included in this class, it is important to check on <https://www.ocwentcpa-settlement.com>.

If you would like to discuss a potential Telephone Consumer Protection Act case, please contact Jeff

Price, a lawyer in our firm, at 800-898-2034 or by email at [Jeff.Price@beasley-allen.com](mailto:Jeff.Price@beasley-allen.com).

### NEARLY 40,000 USERS' PAYMENT CARD DETAILS STOLEN IN MAJOR SECURITY BREACH INVOLVING ONEPLUS

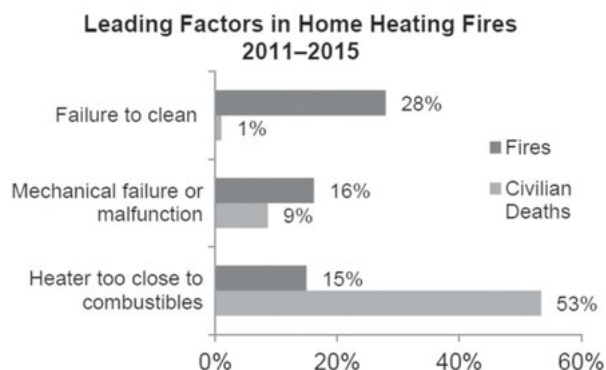
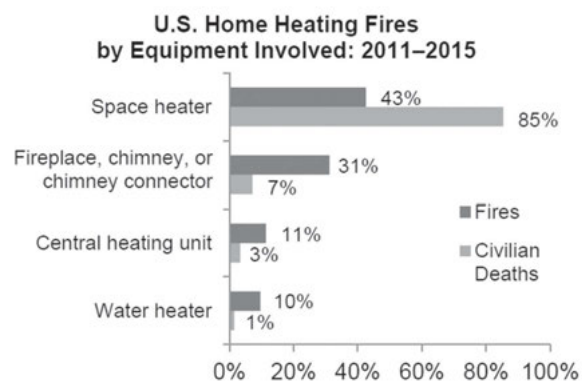
OnePlus confirmed last month that it had suffered a major data breach potentially compromising the payment card details of up to 40,000 customers. In an email sent to customers on Jan. 19, the Chinese phone maker said its website, OnePlus.net, was hacked with a malicious script injected into the company's payment page designed to harvest sensitive data from visitors' browsers. OnePlus said in a statement:

*The malicious script operated intermittently, capturing and sending data directly from the user's browser. It has since been eliminated. We have quarantined the infected server and reinforced all relevant system structures.*

Customers who entered their credit card details on OnePlus' website between mid-November 2017 and Jan. 11, 2018, may have been affected by the breach. Compromised data includes customers' credit card numbers, expiry dates and security codes. The company said users who paid with a previously saved credit card on file, PayPal or the "Credit card via PayPal" methods "should not be affected" by the intrusion. It added that customers' card details are never processed or stored on the OnePlus.net site. "It is sent directly to our PCI-DSS-compliant payment processing partner over an encrypted connection, and processed on their secure servers," it noted.

Only potentially affected users have received a notification email regarding the breach and have been offered a year of credit monitoring.

The disclosure comes several days after reports of credit card fraud began popping up earlier this month after users purchased OnePlus products from the official OnePlus.net store. The company temporarily shut down credit card payments for its online store last week and launched an investigation into the "serious issue" with the assistance of a third-party security firm. The issue was first reported by forum user @superduty-nick. OnePlus has not provided any details of the cause of the breach or when



the malicious script was inserted by hackers.

Customers have been advised to check their payment card statements for any potentially suspicious activity. OnePlus is working with its providers and local authorities to better address the incident.

Source: *International Business Times*

## **XIX. RECALLS UPDATE**

We are again reporting a fairly large number of safety-related recalls. It should be noted that there were fewer auto recalls in January. We have included some of the more significant recalls that were issued in January. If we have missed any significant automobile recalls, let us know. If more information is needed on any of the recalls, readers are encouraged to contact Shanna Malone, the Executive Editor of the Report. We would also like to know if we have missed any safety recalls that should have been included in this issue.

### **TAKATA AIR BAGS RECALL EXPANDS TO INCLUDE AN ADDITIONAL 4.3 MILLION VEHICLES**

Takata is recalling an additional 4.3 million faulty air bag inflators as it expands the largest automotive recall in U.S. history. The phased recalls began in May 2016 stemming from previous Takata air bag incidents, and will continue through December 2019. The latest recalls cover frontal air bags in certain 2009, 2010 and 2013 vehicles made by Honda, Toyota, Audi, BMW, Daimler Vans, Fiat Chrysler, Ford, General Motors, Jaguar-Land Rover, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Subaru and Tesla. Automakers will provide specific models in paperwork that will be filed later this month with the National Highway Traffic Safety Administration (NHTSA). Notices of the expanded recalls were posted on the agency's website.

NHTSA maintains a list of vehicles affected and guidance on steps to take if a car is affected. To find out if a vehicle is on the recall list for defective Takata air bags, visit NHTSA website. All defective Takata air bags are under recall and will be replaced for free. NHTSA has an online lookup tool where drivers can enter a Vehicle Identification Number (VIN) to determine if any safety or recall

issues affect your vehicle. The full list of vehicles affected by the air bag recall, broken down by manufacturer, is also available on the NHTSA website, [www.nhtsa.gov](http://www.nhtsa.gov).

### **FORD ISSUES SAFETY RECALL IN NORTH AMERICA FOR CERTAIN 2006 RANGER VEHICLES**

Ford Motor Company has identified approximately 3,000 2006 model year Ranger vehicles in North America with airbag inflators that pose a higher risk of rupturing in the event of a crash. Dealers are prepared to get vehicles directly from customers, make permanent repairs that will resolve the safety risk and provide a free interim loaner vehicle, if necessary, according to Ford.

Affected vehicles include certain 2006 Ford Rangers built at Twin Cities Assembly Plant from Aug. 10, 2005, to Dec. 15, 2005. The recall involves approximately 2,902 vehicles located in North America, with 2,712 located in the United States and federalized territories and 190 in Canada. The Ford reference number for this recall is 18S02. Ford has a VIN look-up tool at [Ford.com](http://Ford.com) that customers can use to determine if their vehicle is one of those involved in this action. It can be found at <http://owner.ford.com>.

### **MAZDA ANNOUNCES EXPANDED TAKATA AIRBAG RECALL FOR B-SERIES PICKUP TRUCKS**

Mazda has also announced a new Takata call back affecting B-Series trucks. One hundred and sixty B-Series pickups are getting called back by the automaker to fix the deadly airbag defect that has taken the lives of 18 people worldwide. Previously addressing the driver-side airbags, the latest expansion now extends to the passenger-side front airbags in certain B-Series vehicles.

Almost 200 Mazda B-Series pickups got a second call back to fix their Takata airbags. The automaker strongly urges B-Series owners to immediately stop driving their trucks until the issue is fixed. The B-Series pickup, which has the same platform as the Ford Ranger pickups, was manufactured with identical Takata airbags. Dealerships will replace the defective airbags at no cost to the customer. Mazda customers should call the Customer Experience Department if their vehicle is affected at 800-222-5500. If you are not sure whether your car is in need of its Takata airbags

replaced, enter its VIN on the NHTSA recall website.

### **WESTERN GAS RECALLS PROPANE GAS DUE TO FIRE AND BURN HAZARDS**

Western Gas Partners LP, of The Woodlands, Texas, has recalled about 45.7 million gallons of Propane (LP) Gas. The recalled propane may not contain sufficient levels of odorant to help alert consumers to a gas leak. Failure to detect leaking gas can present fire, explosion and thermal burn hazards. This recall involves under-odorized propane (LP) gas delivered to consumers' storage tanks or sold at retail locations in portable cylinders (for use in recreational vehicles, barbecues, stoves and other appliances). Propane tanks that have been inspected for the level of odorant or have been refilled after November 2017 are not affected.

The gas was distributed in Colorado, Montana, Nebraska, South Dakota and Wyoming, delivered by various companies and sold by various retailers from April 2015 through October 2017. Consumers should not attempt to test the propane themselves. Instead, consumers who have propane delivered to storage tanks should immediately contact their supplier or Western Gas to determine whether their propane is affected and arrange for a free inspection. If the inspection confirms the propane contains insufficient levels of odorant, Western Gas will promptly arrange for additional odorization or replacement of the under-odorized propane.

Consumers who have purchased a portable cylinder should contact the retailer or the Western Gas hotline to determine whether their propane may be affected and if so, return the cylinder to the retailer for a replacement. If consumers do smell even a faint odor of gas or a gas leak, they should immediately leave the building and call 911 or their gas supplier from a neighbor's phone. Do not light a match, turn on a light or switch on anything electrical. Contact Western Gas toll-free at 833-444-1451 from 9 a.m. to 5 p.m. MT Monday through Friday, email at [info@propaneawareness.com](mailto:info@propaneawareness.com) or online at [www.propaneawareness.com](http://www.propaneawareness.com). Pictures available here: <https://www.cpsc.gov/Recalls/2018/Western-Gas-Recalls-to-Inspect-Propane-Gas-Due-To-Fire-and-Burn-Hazards>



**HP RECALLS BATTERIES FOR NOTEBOOK COMPUTERS AND MOBILE WORKSTATIONS DUE TO FIRE AND BURN HAZARDS**

HP Inc., of Palo Alto, California, has recalled about 50,000 lithium-ion batteries for HP notebook computers and mobile workstations in the U.S. and an additional 2,600 that were sold in Canada. The lithium-ion batteries can overheat, posing fire and burn hazards. This recall involves lithium-ion batteries for HP Notebook computers and mobile workstations. The batteries were shipped with or sold as accessories for HP ProBooks (64x G2 and G3 series, 65x G2 and G3 series), HPx360 310 G2, HP Envy m6, HP Pavilion x360, HP 11, HP ZBook (17 G3, 17 G4, and Studio G3) Mobile Workstations. The batteries were also sold as accessories or replacement batteries for the HP ZBook Studio G4 mobile workstation or for any of the products listed above. HP has received eight reports of battery packs overheating, melting, or charring, including three reports of property damage totaling \$4,500 with one report of a minor injury involving a first degree burn to the hand.

The computers were sold at Best Buy and other stores and authorized dealers nationwide and online at [www.amazon.com](http://www.amazon.com), [www.hp.com](http://www.hp.com) and other websites. The batteries were shipped in notebook computers and mobile workstations sold from December 2015 through December 2017 for between \$300 and \$4,000. The batteries were also sold separately for between \$50 and \$90. Consumers should immediately visit [www.hp.com/go/batteryprogram2018](http://www.hp.com/go/batteryprogram2018) to see if their battery is included in the recall and for instructions on how to enable "Battery Safety Mode" if their battery is included in the recall. The website provides consumers instructions on how to initiate the validation utility to check their battery and what to do if their battery is included in the recall. These batteries are not customer-replaceable. HP will provide free battery replacement services by an authorized technician. Contact HP toll-free at 888-202-4320 from 8 a.m. to 7 p.m. CT Monday through Friday or online at [www.hp.com/go/batteryprogram2018](http://www.hp.com/go/batteryprogram2018) or [www.hp.com](http://www.hp.com) and click "Recalls" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/HP-Recalls-Batteries-for-Notebook-Computers-and-Mobile-Workstations-Due-to-Fire-and-Burn-Hazards>

**FUJIFILM RECALLS POWER ADAPTER WALL PLUGS SOLD WITH DIGITAL CAMERAS DUE TO SHOCK HAZARD**

FUJIFILM North America Corporation, of Valhalla, New York, has recalled about 270,000 Power adapter wall plugs sold with Fujifilm digital cameras. The power adapter wall plug can crack, break or detach and remain in the wall and expose live electrical contacts, posing a shock hazard. This recall involves AC-5VF power adapter wall plugs sold with Fujifilm digital camera models XP90, XP95, XP120, XP125, X-A3 and X-A10. The digital cameras were sold in a variety of colors. The recalled wall plugs are black and are combined with a power adapter and USB cord that plugs into the adapter. Model number "AC-5VF" is printed on the back of the power adapter. The serial number is printed on the bottom of the camera or under the battery compartment lid. To check your serial number, visit <http://fujifilmusa.com/support/recall/index.html>

The cameras were sold at mass merchandisers, electronics and membership club stores nationwide and online at Amazon.com and other websites. The XP90 and XP95 were sold from June 2016 through January 2018, the XP120 and XP125 were sold from January 2017 through January 2018, the X-A3 was sold from October 2016 through January 2018, and the X-A10 was sold from February 2017 through January 2018. The digital cameras were sold for between \$160 and \$600 with the power adaptor wall plugs. Consumers should immediately stop using the recalled power adapter wall plugs and contact Fujifilm for a free replacement. Consumers can continue to charge the camera using the USB cable attached to a computer. Contact Fujifilm toll-free at 833-613-1200 from 9 a.m. to 8 p.m. ET Monday through Friday, email at [productsafety@fujifilm.com](mailto:productsafety@fujifilm.com), or online at [www.fujifilmusa.com](http://www.fujifilmusa.com) and click on "Support & Contact" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Fujifilm-Recalls-Power-Adapter-Wall-Plugs-Sold-with-Digital-Cameras-Due-to-Shock-Hazard>

**PANASONIC RECALLS FLAT SCREEN TELEVISIONS AND SWIVEL STANDS DUE TO TIP-OVER HAZARD**

Panasonic Corporation of North America, of Newark, New Jersey, has recalled about 755 Panasonic 55-inch flat

screen LED/LCD televisions with tabletop swivel stands. The mounting screws that connect the swivel stand to the television can come loose and cause the television to tip over and fall off the stand unexpectedly, posing serious tip-over and entrapment hazards that can result in injuries or death to children. This recall involves Panasonic 55-inch, LED/LCD flat screen televisions with a tabletop swivel stand intended for use in hotels, government buildings and schools. The televisions are black and "Panasonic" is printed on the front. The television's model number is TH055LRU50. The model number is printed on a tag located in the center of the back of the television. The swivel stand is a glossy black color and measures 50.5 inches long by 32 inches tall by 11.1 inches deep. There is a label on the front underside of the base as well as a number etched into the metal.

The television and swivel stands were sold to hotels, government buildings and schools from July 2012 through March 2014 for about \$1,825 for the television and the swivel stand. Consumers using the swivel stand should immediately detach it, place the television in a safe location away from children and contact Panasonic for a free repair kit. Contact Panasonic toll-free at 855-772-8324 between 8 a.m. and 8 p.m. ET Monday through Friday, email [prodisplaysupport@us.panasonic.com](mailto:prodisplaysupport@us.panasonic.com) or online at [www.panasonic.com](http://www.panasonic.com) and click on "ANNOUNCEMENT" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/panasonic-recalls-flat-screen-televitions-and-swivel-stands-due-to-tip-over-hazard>

**SKIP HOP RECALLS CONVERTIBLE HIGH CHAIRS DUE TO FALL HAZARD**

Skip Hop, Inc., of New York, has recalled about 7,900 Tuo Convertible High Chairs in the United States. An additional 2,000 were sold in Canada and are also part of the recall. The front legs on the highchair can detach from the seat, posing fall and injury hazards to children. This recall involves the charcoal colored Tuo convertible high chair, which can be converted into a toddler chair. The style numbers are 304200 and 304200CN with a date code found on the back of the chair as follows: HH10/2016, HH11/2016, HH3/2017 and HH4/2017. The highchairs have a reversible seat pad, removable tray, 5-point harness, beechwood footrest and legs. Skip Hop has received 13

reports of the legs of the high chairs detaching, resulting in two reports of bruises to children.

The high chairs were sold at: Babies "R" Us, Buy Buy Baby, Target, Kohls, Dillards and other children specialty stores nationwide and online at Amazon.com and SkipHop.com from December 2016 through September 2017 for about \$160. Consumers should immediately stop using the recalled high chairs and contact Skip Hop for a free replacement. Contact Skip Hop toll-free at 888-282-4674 from 9 a.m. to 5 p.m. ET Monday through Friday, or online at [www.skiphop.com](http://www.skiphop.com) and click on "Recalls" for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Skip-Hop-Recalls-Convertible-High-Chairs-Due-to-Fall-Hazard>

#### **FDA ISSUES HIGHEST-LEVEL RECALL FOR J&J HEART DEVICE**

The U.S. Food and Drug Administration (FDA) announced its strictest form of recall for a cardiac device manufactured by a Johnson & Johnson unit because a faulty valve poses the risk of a patient becoming seriously injured or dying. The FDA identified the recall of Agilis Steerable Introducer Sheath devices made by Sterilmed Inc. as a Class I recall, its most serious type. The sheath is used to insert and position cardiovascular catheters, including on the heart's left side through the wall of tissue separating the right and left chambers of the heart. The sheath's hemostatic valve, which blocks blood from flowing back through the valve, is at risk of failing because of an improper seal on the sheath's hub, the FDA said. "Improper seals can allow blood to leak through the hub, cause the cap to fall off during the procedure or can create a difference in pressure that allows air into the circulatory system (air embolism)," the FDA said.

The improper seal happens when there isn't enough glue used to reattach the sheath's cap after use, the FDA said. And too much glue can also block the valve and make the device unusable, according to the FDA. "The use of affected products may cause serious health consequences for patients, including death," the FDA said. There are 112 affected devices included in the recall, which covers sheaths made between Jan. 1, 2017, and May 5, 2017, according to the FDA.

Patients with a lower body mass index may be more at risk if there is blood loss, the FDA said. Smaller patients and those

with a pre-existing lower lung capacity may also be more susceptible to air embolisms. The FDA advised health care facilities and providers to examine their inventories for the sheath and return any unused ones to Sterilmed. Providers should continue to monitor patients treated with the sheath as normal, the FDA said. A Sterilmed representative said on Wednesday that the company initiated the recall in June and has not received any reports of adverse events related to the devices.

#### **BED BATH & BEYOND RECALLS HUDSON COMFORTERS BY UGG DUE TO RISK OF MOLD EXPOSURE**

Liberty Procurement Co. Inc., of Union, New Jersey, an affiliate of Bed Bath & Beyond Inc., of Union, New Jersey, has recalled about 175,000 Hudson comforters by UGG. Mold can be present, posing a risk of respiratory or other infections in individuals with compromised immune systems, damaged lungs or an allergy to mold. This recall involves Hudson comforters by UGG. The polyester comforters were sold in four different solid colors: garnet, navy, gray, and oatmeal, and three sizes: twin, full/queen, and king.

The comforters were sold at Bed Bath & Beyond stores nationwide and online at [www.bedbathandbeyond.com](http://www.bedbathandbeyond.com) from August 2017 through October 2017 for about \$70 (twin), \$90 (full/queen), and \$110 (king). Consumers should immediately stop using the recalled comforters and return them to Bed Bath & Beyond for a full refund. Contact Bed Bath & Beyond at 800-462-3966 any time or online at [www.bedbathandbeyond.com](http://www.bedbathandbeyond.com) and click on "Product Recall Information" at the bottom for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Bed-Bath--Beyond-Recalls-Hudson-Comforters-by-UGG-Due-to-Risk-of-Mold-Exposure>

#### **COMFORT RESEARCH RECALLS BEAN BAG CHAIR COVERS DUE TO RISKS OF ENTRAPMENT, SUFFOCATION TO CHILDREN**

Comfort Research LLC, of Grand Rapids, Michigan, has recalled about 1,200 Ultra Lounge bean bag chair covers. The zippers on the bean bag chair covers can be opened by children who can then crawl inside, become entrapped, suffocate or choke on the bean bag chair's foam beads. Consumers

should immediately take bean bag chairs with the recalled covers away from children and contact Comfort Research for a full refund. This recall involves Comfort Research's Ultra Lounge bean bag chair covers. The natural polyester Sherpa, teardrop-shape bean bag chair cover measures 28 inches by 28 inches by 36 inches and has two zippers on the exterior. The covers were sold without foam bead filling in a DIY package. The covers have three sewn-in tags. One tag reads "id COLORS" on the front and "RN48711" on the back. The second tag has the UPC label code "PO#12991" or "PO#13539" on the front. And, the third tag has the care and use instructions printed on one side and the warning notice on the other.

The bags were sold at Kroger, Meijer and Shopko from April 2017 through August 2017 for between \$30 and \$40. Contact Comfort Research toll-free at 844-578-8933 from 9 a.m. to 5 p.m. ET Monday through Friday or online at [www.comfortresearch.com](http://www.comfortresearch.com) and click on the Safety Recall Notices link for more information. Pictures available here: <https://www.cpsc.gov/Recalls/2018/Comfort-Research-Recalls-Bean-Bag-Chair-Covers-Due-to-Risks-of-Entrapment-Suffocation-to-Children>

Once again, as stated above, there have been a fairly large number of recalls since the last issue. We included those of the highest importance and urgency. If you need more information on any of the recalls listed above, visit our firm's web site at [www.BeasleyAllen.com](http://www.BeasleyAllen.com) or our blog at [www.RightingInjustice.com](http://www.RightingInjustice.com). We would also like to know if we have missed any significant recall that involves a safety issue. If so, please let us know. As indicated at the outset, you can contact Shanna Malone at [Shanna.Malone@beasleyallen.com](mailto:Shanna.Malone@beasleyallen.com) for more recall information or to supply us with information on recalls.

## **XX. FIRM ACTIVITIES**

#### **BEASLEY ALLEN NAMES NEW PRINCIPALS IN FIRM**

Beasley Allen has named Stephanie Monplaisir and Evan Allen as new Principals in the firm. Both Stephanie and Evan are lawyers in the firm's Personal Injury and Products Liability Section. "Stephanie and Evan are two talented attorneys

who work tirelessly for their clients on behalf of the firm and we are thankful to have them here with us,” said Tom Methvin, who is the firm’s Managing Attorney.

Stephanie joined Beasley Allen in 2011 and she handles complex litigation and appellate proceedings for the firm. She has argued and tried cases in state and federal courts and has been an important member of the trial team in several notable cases, helping secure more than \$30 million in verdicts and settlements.

Evan joined the firm full time in 2012 and he now primarily handles on-the-job products liability cases. Evan has handled many cases involving defective machine design, inadequate guarding and the removal of safety devices. He has also handled negligent installation and maintenance cases involving tires and heavy trucks, and has secured numerous verdicts and settlements on behalf of his clients.

Stephanie and Evan are two very good lawyers and we are blessed to have them at Beasley Allen. It is critically important to keep young lawyers coming in and then staying with the firm. Stephanie and Evan are typical of the young lawyers we have at Beasley Allen. All of our lawyers put the interests of their clients first and work hard to obtain justice for them.

#### **BEASLEY ALLEN EMPLOYEE SPOTLIGHTS**

##### **EVAN MILES**

Evan Miles began working at Beasley Allen just over a year ago as a runner. His position sends him around the firm and around town picking up and delivering supplies, paperwork and performing a number of other tasks daily. In that job, Evan stays very busy.

Evan is dual-enrolled at Auburn University Montgomery and is working on earning college credits while finishing up high school at Ezekiel Academy. After graduating this year, he plans to attend Huntingdon College or Auburn University.

Raised in a Catholic home, Evan is the youngest child of Dee and Sandra Miles. Dee is the head of our firm’s Consumer Fraud & Commercial Litigation Section. Evan’s brother, Wilson, is a student at University of Alabama Birmingham and a member of Tau Kappa Epsilon fraternity. His oldest sister, Lauren, is a lawyer with a very good law firm, the Schreiber Law Firm, in Birmingham. Evan’s second

oldest sister, Frances, has just graduated from Huntingdon.

In his free time, Evan enjoys cars, working on his motorcycle, fishing and running. We are pleased to have another member of the Miles family with us. Evan is a very good, hard-working employee.

##### **TIFFANY ROBERTS**

Tiffany Roberts joined our firm in December 2014 in the Mass Torts Section. She is currently investigating cases involving proton pump inhibitors’ (PPIs) link to kidney disease and also works on cases involving defective metal-on-metal hip implants. Tiffany says the ability to help solve problems is her favorite part of her position as a staff attorney with the firm.

Tiffany graduated from Jacksonville State University in December 2008 with a B.A. in political science. She says a legal career was chosen because of its stability. Tiffany graduated from Faulkner University’s Thomas Goode Jones School of Law in May 2012, becoming a member of the Alabama State Bar in September of that year. During law school, Tiffany was an Editor on The Law Review and president of the Student Animal Legal Defense Fund, Jones Chapter. Prior to joining Beasley Allen, Tiffany worked as a clerk for the Honorable Judge Tracy McCooy in Montgomery County Circuit Court.

Tiffany is a supporter of various animal organizations and fosters for the Montgomery Humane Society. She lives in Pike Road with her cats, Oliver and Jack, and dogs, Dexter and Josie. Tiffany is a dedicated, hard-working lawyer and we are fortunate to have her with the firm.

##### **VALERIE G. WALKER**

Valerie Walker is employed as a legal secretary for Graham Esdale and Dana G. Taunton. Among her many contributions to the work of the two Personal Injury and Product Liability Section lawyers, Valerie helps keep client files organized, transcribes dictation, and helps Dana prepare briefs for the Section.

Valerie previously worked for the Firm between May 2001 and February 2002 and worked with Graham and Theresa during her initial stay Beasley Allen. Valerie says that she was fortunate to return to the Firm in 2016, noting she even works at the same desk and same location as she did when she first began her journey at Beasley Allen.

For nearly 30 years Valerie has worked as a legal secretary or paralegal in a number of areas of law and obtained her

Paralegal Certificate in 1993 while attending Huntingdon College.

In October, Valerie and her husband, Robert, celebrated their 20<sup>th</sup> wedding anniversary. She and Robert have three children, who are all grown, and one granddaughter. They enjoy attending Auburn football games and relaxing at home. They are also crazy about animals and currently enjoy caring for their three Yorkies and four cats. Valerie admits she loves caring for any other animals she can sneak into the house. When she has spare time, you can find Valerie reading, or watching a cooking show.

Valerie says she loves her position at the Firm and that she happily assists Graham, Dana and Theresa Perkins every day. We are blessed to have this dedicated hard-working employee with the firm.

##### **ELIZABETH WILLIAMS**

Elizabeth Williams, a digital marketing assistant in our Marketing Department, is the firm’s photographer and videographer. She captures and visually communicates our story. From the excellent graphics showcased on our websites, to the trendy videos on our social media platforms, to the graphic design of Beasley Allen’s various publications and signage, Elizabeth’s work personifies our brand.

In March 2015, Elizabeth joined the firm as a staff assistant in the Toxic Torts Section. After her talent as a photographer and her passion for graphic design were discovered by the folks who “run” our firm, Elizabeth moved to what is now our firm’s Marketing Department. She is particularly proud that she is a “self-taught” artist and appreciates having a job that also provides a channel for her creativity. Elizabeth is thankful for the strong work ethic instilled by her mom, a single mother who adopted Elizabeth when she was a baby.

The self-professed “mamarazzi” confesses that her own daughter Kinsley, or Kins (5), is the subject of most of her time and photography when Elizabeth isn’t at work. And Elizabeth says, “I love being a mom!”

Elizabeth just celebrated her first anniversary with our marketing department. She does very good work and is a most valuable employee. We are fortunate to have her talents and dedication to the firm with us.

## XXI. SPECIAL RECOGNITIONS

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### **ALABAMA IS FORTUNATE TO HAVE DR. DAVID BRONNER IN CHARGE AT RSA**

Dr. David G. Bronner, the CEO of the Retirement Systems of Alabama (RSA), has been in Alabama for about 47 years. He came to the state to attend law school at the University of Alabama. Fortunately for Alabamians, and especially for teachers and state employees, David stayed in our state. He taught at the University and later became Assistant Dean of the Law School. I met David in 1973 when he took the job at RSA.

David has done a tremendous job for RSA and he has contributed greatly in many ways to his adopted state. However, David still has his critics. Some of these critics have ulterior motives of a political nature. Some of the critics would like to get their hands on the funds being handled by RSA to use to plug holes in state budgets. Others just believe they could do a better job of handling investments, even though they have no prior experience.

One of David's strong points is that you never have to wonder where he stands on any given issue. He is outspoken and doesn't let controversy bother him. In my opinion, David is an outstanding American and a tremendous asset to Alabama.

Dr. Bronner wrote a short piece recently discussing a topic that affects all state employees, including teachers, in the state's retirement system. I am including his remarks below.

After decades of ERS Board meetings, I must admit I still marvel at how some politicians work to get their hands on ERS funds. Remember, the TRS Board is controlled by the members, the ERS Board is not. Maybe it is time for ERS members to do something about that! A first for me in my forty-plus years at the RSA was how some current ERS Board members wanted to hire their own outside attorney to make legal decisions for the Board. One trustee actually said, "We just need different voices." Great! Let's just have total chaos. Maybe he does not understand that lawyers are paid to argue one side or the other of an issue. The

RSA legal staff has only one side: our members' protection.

When I came to the RSA, we only had one attorney—me! Now, RSA members have a very professional legal department with only one objective: Making the RSA as sound and safe as possible. The 6-6 vote for hiring independent fiduciary counsel failed thanks to Board members David Bollie, Jim Fibbe, Bill Flowers, Ben Powell, Steve Walkley, and Steve Williams.

On top of this attempted move, the Finance Director suggested we have too much invested in stocks (oops, that gave the RSA its high returns for years), and the RSA now needs more bonds. Buying even more bonds at 2% or less would truly give you a reason to criticize the RSA staff!

Maybe the general public and some members do not understand—the RSA made \$4.0 BILLION in "net investment earnings" in FY2017 (for those who focus on losses, losses are deducted) and paid out \$3.2 billion in pensions.

YET the assets increased by \$1.7 billion for the TRS and \$942.0 million for the ERS—or \$2.6 billion. By the way, YOUR RSA investment staff cost was \$9 million for FY2017.

Two other southern states that are the same size but with "outside money managers" (that some politicians on the ERS Board desire) cost one state \$340 million and the other state \$360 million for ONE year!

David Bronner is one of the smartest individuals I have ever dealt with. He has brought together a talented, hard-working and well-respected staff at RSA. There are plenty of checks and balances in place to make sure the retirement system operates properly and efficiently. I trust David to do his job and to do it well. Handling the funds and making good investments is extremely important and his record is one of the best in the country. My advice to the legislators is to let this man do his job!

### **BOOKS WRITTEN BY BEASLEY ALLEN LAWYERS**

Lawyers in our firm have become leaders in several areas of litigation. Several of them have written books to

help other lawyers around the country with their practices. These books are free to lawyers, and available as digital e-books for download to your Kindle or other device. We will also be happy to send you a hard copy of any of these publications.

### **Aviation Litigation**

In his book, *Aviation Litigation & Accident Investigation*, Beasley Allen lawyer Mike Andrews discusses the complexities of aviation crash investigation and litigation. He provides basic instruction on investigating an accident, preserving evidence, and anecdotal instances of military and civilian crashes.

### **Whistleblowers**

In this book, *Whistleblowers: A Brief History & A Guide to Getting Started*, lawyer Lance Gould, a lawyer who handles whistleblower litigation for the firm, provides background on whistleblower law, and how it now applies to organizations including Medicare/Medicaid, the IRS and SEC, and motor vehicle safety. Learn how to identify a whistleblower claim and navigate these complex claims.

### **Trucking Litigation**

Chris Glover, who practices in our Atlanta office, wrote *An Introduction to Truck Accident Claims: A Guide to Getting Started*. This volume covers topics including the basics of trucking regulations and requirements, how to prepare for your case, potential Defendants, and common issues that arise in commercial vehicle litigation.

### **Tire Litigation**

The purpose of Ben Baker's book, *Tire Litigation: A Primer*, is to provide lawyers with a guidebook to evaluating tire litigation. Although tire failures, blowouts and detreads are foreseeable and preventable events, all too often consumers are unaware of the potential dangers from defective, old or degraded tires. Ben handles tire litigation for the firm and is in our Personal Injury & Products liability Section.

We have created a page on our website that allows anyone to easily download a digital copy of a book or folks can request a hard copy of our publications. They are available at [www.beasleyallen.com/](http://www.beasleyallen.com/)

books. You can also call 800-898-2034 to request a copy of a book.

**KENDALL DUNSON RECOGNIZED AS 2017 ALABAMA LAW FOUNDATION FELLOW**

Beasley Allen lawyer Kendall Dunson has been selected as a 2017 Alabama Law Foundation Fellow. At the start of every year, the Alabama Law Foundation selects Alabama Bar members who have shown outstanding dedication to their profession and their community by inviting them to become Fellows. Since no more than 1 percent of Bar members are invited into fellowship, the selection committee chooses new members from an exceptional group of lawyers.

Kendall handles product liability, general personal injury and workers' compensation cases involving defective industrial machinery as a member of Beasley Allen Law Firm's Personal Injury and Product Liability Section. He has worked on numerous cases to compensate clients for their losses and influence corporations to design and manufacture safer products.

Most recently, Kendall has been involved in several multimillion dollar lawsuits, including a \$24.75 million verdict in a premises liability case; a \$18.79 million verdict in a commercial truck product liability case; a \$5.75 million verdict in a maritime lawsuit; and a \$4.7 million verdict in a seat belt failure case. He and his Beasley Allen law partner Mike Andrews also recently secured an \$8 million jury verdict on behalf of a woman who was seriously injured when her Volkswagen suddenly accelerated out of her control and crashed.

Kendall was a member of the trial team that handled a wrongful death case against a corporate defendant resulting in the largest jury verdict ever in Selma, Alabama. That suit influenced the corporate defendant to outfit its entire fleet of trucks with audible backup alarms. He also handled the suit over a bus collision case in Huntsville, Alabama, that caused the death of four students and numerous injuries. The suit resulted in the cancellation of the contract between the county and the defendant, which had the duty to safely transport students to school in Madison County.

Kendall was selected as Beasley Allen's Litigator of the Year in 2013, and again in 2015. In 2014, Kendall was recognized as our firm's Personal Injury Section Lawyer

of the Year. He also has been selected for inclusion on the Best Lawyers in America list since 2016 and to the 2017 Super Lawyers list.

Kendall is a tremendously talented lawyer who is totally dedicated to his clients and to the quest for justice. We are blessed to have him with the firm.

**DR. MARGARET THOMPSON NAMED TO THE NATIONAL PHYSICIANS ALLIANCE BOARD OF DIRECTORS**

Beasley Allen lawyer Margaret Thompson, MD, JD, MPAFF was recently named to the board of directors of the National Physicians Alliance. The National Physicians Alliance is an advocacy group committed to advancing the core values of the medical profession: Service, Integrity, and Advocacy. Dr. Thompson is one of the few doctor-lawyers working in the field of women's health advocacy. Her medical expertise, combined with her legal and public policy knowledge and passion for women's issues, makes her an effective crusader for women's reproductive health rights and progressive health policy. We are blessed to have her with us at Beasley Allen.

**ANDREW BRASHIER FEATURED ON A CLE PANEL INVOLVING THE FALSE CLAIMS ACT**

On Wednesday, March 7, Andrew Brashier, a lawyer in our firm's Consumer Fraud & Commercial Litigation Section, will participate in a CLE panel discussing the False Claims Act (FCA). The CLE is sponsored by the Federal Bar Association's *Qui Tam* Division and features notable FCA practitioners overviewing the FCA, discussing relevant cases and trends regarding the FCA, and providing diverse perspectives and practice tips regarding the FCA. This CLE is part of a series of CLEs aligned with select U.S. Attorneys' offices across the country created to demystify the filing and government investigation inherent in FCA *qui tam* cases.

The FCA imposes liability on persons or companies who defraud the government or its programs and serves as the federal government's primary tool for combatting fraud against the government. The law provides that anyone who conspires or knowingly submits false claims, whether to receive or avoid payments, is liable for the government's damages. The government may file its

own FCA lawsuit or whistleblowers (known as "relators") may file a *qui tam* suit on behalf of the government. If a suit is filed by a realtor, the realtor litigates the case unless the government decides to intervene. At the end of the litigation, the realtor will receive 15-30 percent the government's recovery.

The CLE will be held from 11:30 a.m. through 2:30 p.m. on Wednesday, March 7, at the Frank M. Johnson U.S. Courthouse Complex. The CLE will be moderated by R. Scott Oswald of the Employment Law Group. Among the panelists are Andrew Brashier, from our firm; Jerusha Adams, Assistant U.S. Attorney for the Middle District of Alabama; Don Long, Assistant U.S. Attorney for the Northern District of Alabama; Deidre Colson, Assistant U.S. Attorney for the Southern District of Alabama; Thomas K. Potter III, a lawyer with Burr & Furman; and the Honorable Keith Watkins, Chief Judge of the U.S. District Court for the Middle District of Alabama.

Anyone interested in learning more about the FCA is encouraged to attend the CLE. For more information and to register, visit <http://www.fedbar.org/Sections/Qui-Tam-Section/Qui-Tam-Section-Calendar/False-Claims-Act-Today-Alabama.aspx>.

A number of lawyers at Beasley Allen are experienced with the False Claims Act and have had successful results in FCA litigation. Our lawyers are able to guide whistleblowers along the process. If you have any information and would like to speak with a lawyer, contact Andrew Brashier at [Andrew.Brashier@beasleyallen.com](mailto:Andrew.Brashier@beasleyallen.com); Archie Grubb at [Archie.Grubb@beasleyallen.com](mailto:Archie.Grubb@beasleyallen.com); Lance Gould at [Lance.Gould@beasleyallen.com](mailto:Lance.Gould@beasleyallen.com); and Larry Golston at [Larry.Golston@beasleyallen.com](mailto:Larry.Golston@beasleyallen.com). You can also call them at 800-898-2034 or 334-269-2343.

Sources: 31 U.S.C. §§ 3729 et seq. (West); [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf), <http://www.fedbar.org/Sections/Qui-Tam-Section/Qui-Tam-Section-Calendar/False-Claims-Act-Today-Alabama.aspx>.

**BEASLEY ALLEN SPONSORS 5K AND YOUTH DONUT RUN TO BENEFIT BRANTWOOD CHILDREN'S HOME**

For the second year our firm will be the proud sponsor of Brantwood Children's Home's annual 5k Love Run and Youth Donut Run through downtown Montgomery! The race will be held on Saturday, Feb. 10.

Past race participants have billed it “the toughest 5k in Montgomery,” designed to simulate the incredible hardships some of Brantwood’s children have endured in their short lifetimes. More than a home, Brantwood really is a place where children are nurtured and supported just as they would receive at home with family. Archie Grubb, a lawyer in our firm, is serving as the President of Brantwood’s Board of Directors this year.

Since 1917, Brantwood Children’s Home has been providing a safe, stable, structured environment for abused, neglected and other “at-risk” children. Currently Brantwood serves children and youth ages 10-21. Brantwood offers programs that are designed to help these young people cope with and succeed in society. For more information about Brantwood programs, visit [www.brantwoodchildrenshome.org](http://www.brantwoodchildrenshome.org).

## XXII. FAVORITE BIBLE VERSES

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Bruce Hudgins, who works at the Retirement Systems of Alabama as a Senior Technical Support Analyst, says one of his favorite bible verses is one familiar to all of us. That verse is John 3:16-17.

*For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life. For God did not send His Son into the world to condemn the world, but that the world through Him might be saved. John 3:16-17*

Bruce has expressed his love and appreciation for these verses in the following prayer:

*My Father, your abundant and extreme love for the world (us and everything You created in it) caused You, out of that true nature that You are (Love), to give Your most valued treasure—a treasure that nothing can match or attain the value of. You gave your only Son (Jesus) so that any of us in the world that were destined to destruction because of sin, who were not worthy in and of ourselves, and without hope in the world, could believe on You, Jesus, and receive*

*and become the same value that You, Jesus, are to the Father and have the destiny (joint heirs) that you have. Because God, You my Father didn’t send the gift of Jesus my Lord to shame, place guilt on, or judge us here in the world, but to save us from the world and its ways that destined us for destruction. Thank you Father and my Lord Jesus for such a wonderful love for me and all who will believe! Thank you Holy Spirit for revealing and bringing us to such an Awesome and Almighty Love!*

Rachel Boyd, a lawyer in our firm, sent in two verses for this issue. Rachel works in the Consumer Fraud & Commercial Litigation Section. She believes the first verse, Proverbs 31:8-9, really goes to the heart of Beasley Allen’s fundamental mission and that is to help those who need it most. As lawyers, Rachel says it’s our duty to speak for those who need us and defend their rights, ensuring that they receive justice. She says Proverbs 31:8-9 is a verse that all lawyers should always keep in mind.

*Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy. Proverbs 31:8-9.*

The second verse is from John and is special to Rachel. She says, “sometimes we all need a reminder to be more like Jesus; to let the joy and love of Jesus radiate from within.”

*A new command I give you: Love one another. As I have loved you, so you must love one another. John 13:34*

Kwanzaa White, who does a tremendous job as a receptionist with the firm, sent in Proverbs 16:3 as a verse for this issue. She says “This is a short verse, but it’s meaning is so BIG. I read it often, and it helps me to realize that no matter how small we think we are contributing, we all have a great task and purpose. If we commit to doing God’s will and honoring HIM in all that we do, the reward will be great, and it makes everything we do meaningful.”

*Commit thy works unto the Lord, and thy thoughts shall be established. Proverbs 16:3 King James Version (KJV)*

## XXIII. CLOSING OBSERVATIONS

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### **BEASLEY ALLEN REPRESENTS CLIENTS IN THEIR QUEST FOR JUSTICE**

In January 1979, I was considering my work options for my future and I wanted to stay in Montgomery. I had served as Lieutenant Governor under Gov. George Wallace, and even served as “Acting Governor” in 1972 after the governor was shot in Maryland in an assassination attempt. I didn’t always agree with Gov. Wallace on some of his positions, but that’s another story for another day. Feeling that politics and public service was a road I needed to stay on, in 1978 I made a run for Governor. But I was soundly defeated in the race.

Having been Lt. Governor for eight years, and prior to that having been a fairly successful lawyer for about eight years, I felt that I would have no problem securing a position with a good law firm. I sent out resumes in the Fall of 1978 to a number of firms in Montgomery since I wanted to live and work in Montgomery. I was certain that I would have several offers to consider. However, I was shocked when I didn’t get even a single reply from law firms in the Capital City.

I must admit that while I was somewhat disappointed, I didn’t let it get me down. In late December, I went by to see Judge Frank M. Johnson to ask his advice on what I should do. I explained my financial situation to him and told him that I really needed to find a job so that I could support my family and start paying off campaign debts. I asked him if I should consider working for a state agency. I had been offered a low level cabinet position by Gov. Fob James.

Judge Johnson, in his stern manner, with his glasses down on his nose, told me that I needed to practice law and to represent folks who needed help. He told me that too many lawyers were afraid to take on the rich and powerful in corporate America. I left Judge Johnson’s office without any job prospects, but with a good feeling about my future as a lawyer.

After a blessed Christmas season, I started in earnest to make plans for opening a law office. It was now certain that I was going to be a sole practitioner. My desire was to be a lawyer who would help folks who needed help in their quest for justice. The wise counsel that Judge

Johnson had given to me was still firmly embedded in my mind. The fact that a man of his status had confidence in me was a definite inspiration. But I also knew I would face a real challenge since I was basically starting all over again as a lawyer.

I rented a small office in Montgomery on Hull Street from my friend Irvin Winter. I was the only lawyer and Karen Lewis, who had worked with me in the Lt. Governor's office, had agreed to be my secretary. Karen was taking a big gamble because with her ability and work ethic she could have had a much better job with a much more promising future. We added one more clerical employee and opened for business on Jan. 7, 1979.

Today, the firm operates as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., and is one of the largest Plaintiff's law firms in the country. Beasley Allen is one of Montgomery's largest employers, with 80 attorneys and more than 250 support staff. We also have an office in Atlanta, which extends our reach in the Southeast and allows us to serve more clients. Beasley Allen has successfully represented hundreds of thousands of people across the United States.

God has blessed me with both the ability and the desire to be a lawyer who helps people who need the help of a trial lawyer. It's one of the greatest pleasures of my job to know when people leave our office, they are in better shape, and that we have helped to make their lives better.

#### OUR MONTHLY REMINDERS

*If my people, who are called by my name, will humble themselves and pray and seek my face and turn from their wicked ways, then will I hear from heaven and will forgive their sin and will heal their land.*

2 Chron 7:14

*All that is necessary for the triumph of evil is that good men do nothing.*

Edmund Burke

*Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed. To rob the needy of justice, And to take what is right from the poor of My people, That widows may be their prey, And that they may rob the fatherless.*

Isaiah 10:1-2

*I am still determined to be cheerful and happy, in whatever situation I may be; for I have also learned from experience that the greater part of our happiness or misery depends upon our dispositions, and not upon our circumstances.*

Martha Washington (1732 - 1802)

*The only title in our Democracy superior to that of President is the title of Citizen.*

Louis Brandeis, 1937  
U.S. Supreme Court Justice

*The dictionary is the only place that success comes before work. Hard work is the price we must pay for success. I think you can accomplish anything if you're willing to pay the price.*

Vincent Lombardi

## XXIV. PARTING WORDS

Recently, my wife Sara and I watched a fairly old movie that I recommend to all Americans. The message from this movie is one that is most timely considering the racial problems facing our country today. The movie, Remember the Titans, first played in theaters in 2000. It was based on a true story of how in 1971 a football team in Alexandria, Virginia, and the people in the town, dealt with racial integration of the school and the team.

Having attended a segregated school and playing on a football team made up of all whites, and living through the tense times in Alabama after the *Brown v. Board of Education* decision in 1954, I can identify with what the players at T.C. Williams High School and the townspeople in Alexandria had to deal with. Those years were not good times for America.

The film does a tremendous job of reflecting the divisive nature of the times. The racial tensions were very high in those days and most whites could not accept the changes they felt were being forced on them.

The head coach of the Titans was black and he had replaced a very popular white coach who became his assistant and defensive coordinator. Denzel Washington played the role of Herman Boone and did a tremendous job. The white coach (played by Will Patton) had a real difficult time accepting his new demoted role. To make things even more difficult for the team and their coaches, all other schools in the football-crazy school district were not segregated. So each week the Titans faced an all-white team.

The movie shows how the courage of individuals and the power of sports can transcend perceived and ingrained differences. We can all learn lots from the Titans. Therefore, regardless of whether you have seen the movie, see it—you will be blessed! I have seen it at least three times and plan on seeing it again.

We have become extremely divided in America. In recent years, racism has reared its ugly head and that is intolerable. There is far too much hate in America and much of it is based on nothing more than racism.

My prayer today is for unity in this country and for an end to the rise in racism. We must allow God to control our lives and when He is in control, love will replace hate, and folks will accept their differences and concentrate on the many things that make them alike. We cannot tolerate racism in the United States and must unify in our efforts to stamp it out entirely. God loves all of His people!

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No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

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Jere Beasley has been an advocate for victims of wrongdoing since 1962, practicing law in his hometown of Clayton, Alabama, until he was elected Lieutenant Governor of the state of Alabama in 1970, beginning his term in January 1971. During his career, he has tried hundreds of cases. Jere's numerous courtroom victories include landmark cases that have made a positive impact upon our society. His areas of practice include litigation in products liability, insurance fraud, business, nursing home and personal injury.

On January 15, 1979, Jere established a one-lawyer firm in Montgomery, Alabama, now known as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.. He filed his first case on behalf of the practice on January 17, 1979. It has been nearly 40 years since he began the firm with the intent of "helping those who need it most." Today, Beasley Allen has offices in Atlanta and Montgomery. It is one of the country's leading firms involved in civil litigation on behalf of claimants, having represented hundreds of thousands of people.

Beasley Allen employs more than 250 people in Montgomery, including more than 70 attorneys.



No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.